The Central Law Journal.

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Our next issue will, as usual, be the index and last number of this volume, which began with the first of the year. The cordial reception which our last index received from subscribers assured us that we had at last succeeded in presenting an index worthy of the reputation of this JOURNAL, and one which, in point of practical value, could not be excelled. We shall endeavor to make the coming index even more complete. As before, we shall issue a complete index-digest to all the editorials, notes of recent decisions, leading articles, annotated cases, book reviews, etc., and a separate word index to all the weekly digests of current opinions. In this way, we not only give our subscribers an easy reference to all that has appeared in the JOURNAL during the current volume, but we place before them a complete view of all the decisions of the courts for the past six months, thus, in effect, presenting a complete United States digest for the period named.

Notwithstanding the announcement that appears at the head of the column of digests each week, and repeated statements on our part, we have reason to believe that a great many practitioners do not yet appreciate the practical value of this JOURNAL, as a means of keeping up with the current opinions. We are little inclined to sound our own praises, but a proper regard for the truth compels us to say that this JOURNAL is all, in the way of current reporting, that a practitioner absolutely needs. We give him the important cases, reviewed editorially, commented upon at length, or reported in full and annotated, and all of the remainder we present in the form of a very full and complete digest. What more does a lawyer need in this direction? Or rather how much more than this has he the time and inclination to study? It is impossible, even with the greatest industry, to read all the opinions fully, and the system we are pursuing enables one to feel that at least nothing will escape his search. The fact that we are increasing our circulation each year at a substantial rate, that there is hardly a county in the United States where this JOURNAL is not taken, and that the CENTRAL LAW JOURNAL has the largest circulation of any law journal or law newspaper in the world (which we are at all times prepared to substantiate) is the best evidence of its value.

The United States Supreme Court has adjourned until October, without any perceptible relief of its docket. On the contrary, though an increased number of cases have been disposed of during the present term, as compared with previous terms, the court still leaves the docket a little more burdened than it was at the close of last term. According to the reports, the appellate docket of the court at this term exhibits an increase of thirty-one cases in the number left undisposed of, as compared with the docket at the close of the previous term. At the close of the October term, 1888, there remained undisposed of on the appellate docket 1,146 cases. There were docketed during the 1889 term 489 cases, making the total number of cases before the court 1,635, of which 460 were disposed of, or forty-three more than during the previous term. This means that exceptional measures on the part of the members of the present court will not, in the absence of relieving legislation, appreciably lift the pressure on the court or enable it to catch up with its business. In short, legislative action must be had without much delay, unless the court is to get hopelessly in arrears. It is worthy of notice that the most striking feature of the court's work during the term has been the large number and variety of cases involving a construction of the interstate commerce clause of the federal constitution.

Apropos of what we said last week on the subject of criticisms of the decisions of the United States Supreme Court, a correspondent in Iowa sends us an editorial clipped from a daily newspaper published in his locality, commenting upon the "original package" decision. The ideas, expressed by the writer, are so unique and novel that we reproduce it for the benefit of our readers, with the belief

that its study will either lead to a reversal by the supreme court on rehearing, or the incarceration of its author in some private asylum. Here it is *verbatim*, *literatim*, *et punctatim:*

Let us look at this decision just a little. As far as we can learn the supreme Judge took their text from the United States constitution. article as follows, that a congress shall have power to regulate comerce with foreign nations, and among the several states, and with the Indian tribes, now congress seemingly had made no laws about original packages and the supreme court therefore decides that original packages can be shipped into any state by a nonresident.

The supreme court may be higher authority than Iowa and her people and her legislature, but what about congress? Is not congress higher authority than the supreme court? If so, what then about South Dakota, did not South Dakota put prohibition in her constitution? and was not the constitution of South Dakota adopted, as it were under the wings of congress, and sanctioned by congress? And should not this have more weight with the court than the mere silence on the part of congress about original packages? The foreigner and nonresident are preferred, they have more privileges than the resident and the citizen; they can get our money but do not have to pay any of our taxes. Is that good morals or even good law?

As has been noted in these columns, from time to time, the decisions of the federal courts have been uniformly against the constitutionality of the Minnesota meat inspection law. This law prohibited the sale, within the State, of any beef which had not been inspected in the State within twenty-four hours before being slaughtered, and was, of course, a blow at the dressed beef industry. The courts held that the act was repugnant to the provision of the constitution giving congress power to regulate commerce among the several States, as well as the provision declaring that the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States. This was held by Judge Nelson, of the Minnesota district, and by Judge Blodgett, of the Illinois district. Every one was, therefore, prepared for the decision just rendered by the Supreme Court of the United States, which confirms the decisions of the subordinate federal courts holding the act unconstitutional.

NOTES OF RECENT DECISIONS.

CRIMINAL LAW—NUNC PRO TUNC ENTRIES.—A case of considerable interest to criminal practitioners, and involving the question as to the validity of *nunc pro tunc* entries in criminal cases, came before the Supreme Court of the United States in Wight v. Nicholson, 10 S. C. Rep. 487. There, it was held that the federal circuit court, at a subsequent term, may order an amendment of its record by a *nunc pro tunc* entry showing that a criminal cause certified to it by the district court had been remitted before sentence pronounced by the latter court, though no written memoranda of the proceedings of the previous term are on file in the cause. Chief Justice Fuller and Justice Harlan dissented from this conclusion. Justice Miller says:

The present case comes within the clause of this section which declares the power of the court to make *nunc pro tunc* entries to supply some omission in the record of which was done at the time of the proceedings. An extensive list of authorities is cited in the foot-note of Mr. Bishop, and among those which support the power of the court to make a record of some matter which was done at a former term, of which the clerk had made no entry, the following cases directly affirm that proposition: Galloway v. McKeithen, 5 Ired. 12; Hyde v. Curling, 10 Mo. 227; State v. Clark, 18 Mo. 432; Nelson v. Barker, 3 McLean, 379; Bilansky v. State, 3 Minn. 427 (Gil. 313). The opinion of the court in this latter case contains a somewhat full reference to the history of this subject, as it is found in the reports of the English cases, and in Blackstone's Commentaries (volume 3, p. 408,) the result of which is to show that at an early day the English courts exercised this power so recklessly, when the pleadings were all *ore tenus*, and great liberality was necessarily allowed in amendments, that the abuse was corrected by the king, who made the declaration that, "although we have granted to our justices to make record of pleas pleaded before them, yet we will not that their own records shall be a warranty for their own wrong, nor that they may raze their rolls, nor amend them, nor record them contrary to their orginal enrollment." This Blackstone declares, meant only that the justices should not by their own private erasure change a record already made up, or alter the truth to any sinister purpose.

In the Minnesota case, the plaintiff in error had been convicted of the crime of murder, and after trial and verdict, and after the case had been carried to the supreme court of the State, the record of proceedings on the trial was amended so as to show affirmatively that each juror was sworn as prescribed by law; that they were put in charge of the officer to keep them as prescribed by law: and that they were polled at the request of defendant on their coming in with their verdict; matters which, it seems, had been omitted in the record of the judgment. The supreme court in that case, as we think, stated with force and precision the true rule on this subject. They said: "While we would go as far as any court in reprobating a rule which would place the proceedings of a court almost entirely at the mercy of the subordinate officers thereof, we would be scrupulously careful in adopting any rule which would tend to destroy the sanctity or lessen the verity of records. And while we admit the power to amend a record after the term has passed in which the record was made up, we would deprecate the exercise of the power in any case where there was the least room for doubt about the facts upon which the

amendment was sought to be made. * * * But when the facts stand undisputed, and the objection is based upon the technical point alone that the term is passed at which the record was made up, it would be doing violence to the spirit which pervades the administration of justice in the present age to sustain it. It is our opinion that this power, of necessity, exists in the district court, and that its exercise must in a great measure be governed by the facts of each case."

The case in 5 Iredell, although a civil suit, established the doctrine that a court has a right to amend the records of any proceeding term by inserting what had been omitted either by the act of the court or clerk, and that when so amended it stands as if it had never been defective, or as if the entries had been made at the proper time. The case of Hyde v. Curling, 10 Mo. 227, which was also a civil suit, seems to have been well considered, is thus stated in the syllabus of the report: "A court has power to order entries of proceedings had by the court at a previous term to be made *nunc pro tunc*; but, where the court has omitted to make an order which it might or ought to have made, it cannot at a subsequent term be made *nunc pro tunc*." See also State v. Clark, 18 Mo.

ASSIGNMENT FOR THE BENEFIT OF CREDITORS—PREFERENCE—CONFESSION OF JUDGMENT.—In a recent number of the current volume of this JOURNAL, p. 345, we had something to say, by way of criticism, of the case of Farwell v. Nillson, wherein the Supreme Court of Illinois denied the doctrine laid down in White v. Cotzhausen, 28 Cent. L. J. 334, by the Supreme Court, as to the effect of preferences preceding or contemporaneous with an assignment for the benefit of creditors. It will be remembered that the latter court held that under the Illinois statute, the instruments by which such preferences were attempted, were held to operate as an assignment, and hence void under the statute forbidding the giving of preferences in an assignment. The Illinois court, in the case first mentioned, refused their assent to this proposition, though in fact a construction of their own statute. The case is now reported in 24 N. E. Rep. 74, and it appears that the court simply adopt, as their own, the opinion of Judge Moran, filed below. Their conclusion, in substance, is that the Illinois act concerning voluntary assignments does not affect the right of a failing debtor to prefer creditors by giving judgment notes, though all his property be sold on execution to satisfy them, since such notes, not being voluntary assignments, are not within the purview of the act. As we said before, this result is calculated to defeat the very object and intent of the law. So, also, seems to think the Supreme Court of South Carolina, in the recent case of Putney v. Freisleben, 11 S. E. Rep. 337, wherein they hold, upon the authority of White v. Cotzhausen, that where all an insolvent debtor's property is transferred to certain of his creditors by confession of judgment and proceedings thereunder, such acts are equivalent to an assignment with preferences, and are therefore void under Gen. Stat. S. C. § 2014; and that where an insolvent debtor in one day confessed judgment in several suits, and authorized executions to issue forthwith, whereby all his property was transferred to certain creditors, mostly near relatives, such acts were all parts of one transaction, amounting, in effect, to an assignment with preferences. The same doctrine is also laid down in Straw v. Jenks, 43 N. W. Rep. 941.

THE SEPARATE ACKNOWLEDGMENT OF MARRIED WOMEN.

The statutes of nearly one-half of the States require that the acknowledgment of a deed or other conveyance by a married woman shall be made and certified in a manner different from the acknowledgment of other persons. Ordinarily a difference of form and manner is a matter of little consequence, but in this instance the case is quite otherwise, although there is no substantial reason why this should be so, nor why the acknowledgment of the wife should now be in any manner different from that of other persons. The requirement of a privy examination is a relic of the dark ages, already expunged from the statutes of a majority of the States, but through extreme conservatism permitted to yet linger in the jurisprudence of others.

The Wife—Disabilities at Common Law.—At common law the civil disabilities of a married woman was complete; she had no power to contract, and her civil existence was considered as merged in that of her husband.[1] The doctrine of the incapacity of the *feme*

[1] Martin v. Dwelley, 6 Wend. 9; s. c., 21 Am. Dec. 245; Hitz v. Jenks, 123 U. S. 298; 2 Kent's Com. 129, 132, 163; Butler v. Buckingham, 5 Day, 492; s. c., 5 Am. Dec. 174; Blackstone's Com. 291, 292; Goff v. Roberts, 72 Mo. 570; 3 Wash. on Real Prop. 281; Lindley v. Smith, 46 Ill. 523; Baxter v. Bodkin, 25 Ind. 172; Thayer v. Torrey, 37 N. J. Law, 339; Webb on Record of Title, §§ 9, 100.

covert, as it exists at common law, said Judge Hemphill, of the Texas court, though irrational and barbarous, harmonizes, and is in consonance with, and is the result of, rules equally unreasonable, and equally tinged with the reading of the dark ages. "It is the legitimate inference from the portentous doctrine that during coverture the separate legal existence of the wife is extinguished."[2] As the wife had no power at common law to convey her interest in real estate, it could be divested or transferred only through a process in the courts technically termed a fine and recovery; the title passing by virtue of the judgment,[3] and a privy examination being required in order that the court might be satisfied that the action of the wife was voluntary, and free from the legally presumed coercion of the husband.

Power as Conferred by the Statute.—Afterwards the statutes conferred upon the wife the power to convey by deed, but for her protection against the influence of the husband, retained the incident of a privy examination before the officer who might take her acknowledgment. As well said by Mr. Pomeroy, when the common-law dogmas were to be invaded, the better policy would have been to abrogate the wife's common-law incapacities entirely, and to have carried the legal reform to its logical results.[4] It may be fairly contended that the statutes contemplated that the execution of a deed by the wife should convey her title, just as such execution would convey the title of any other person, and that the incident of acknowledgment, though attended with a privy examination, was not designed to be a matter of absolutely controlling significance. If the requirement as to privy examination should not be complied with, and to the wife's injury, she could at law assert her right to have the deed annulled.

The Construction Given the Statutes by the Courts.—When, however, cases first arose in which there had been a failure to comply strictly with the statutes as to privy examination and certificate thereof, the courts, instead of determining the question in accordance with the advancing spirit of the law, looked backward for the rule of construction to the law as it was aforetime, when the wife had no power to convey at all, and through some process of reasoning from that stand-point, reached the conclusion that the matter of privy examination was an absolute qualification and limitation of the statutory grant of power to the wife; an essential part of the transfer of title, and not an incident, and was necessary to the validity of the deed.[5] They held that without the privy examination and due certificate thereof, the title did not pass as between the parties,[6] not even an equitable title;[7] that in such case the deed was as destitute of vitality as so much blank paper;[8] and as the doctrine of estoppel could not be invoked against the wife as against a person *sui juris*, that no acts of hers in connection with such a deed, not amounting to positive and affirmative fraud on her part, could create an estoppel against her so as to give it effect.[9]

The Result of Such Construction.—This construction, now somewhat modified by the

[2] Jones v. Taylor, 7 Tex. 240, 246.

[3] Milner v. Turner's Heirs, 4 Mon. 240, 246; Woodbourne v. Garrell, 66 N. C. 82.

[4] 3 Pom. Eq. Jur., § 1126.

[5] Bank of Healdsburg v Baillhache, 65 Cal. 406; Goodenough v. Warren, 5 Saw. 494; Davis & Agnew, 67 Tex. 205; McCormack v. Woods, 14 Bush, 78. These things are the essence and foundation of the deed. Judge Coke, in Cross v. Evarts, 28 Tex. 502.

[6] Johnson v. Bryan, 62 Tex. 624; Knight v. Paxton, 124 U. S 552; Pickens v. Knisely, 29 W. Va. 1; s. c., 6 Am. St. Rep. 622; Mason v. Brock, 12 Ill. 273; s. c., 52 Am. Dec. 490; Langston v. Marshall, 59 Tex. 296; Jones v. Robbins (Tex.), 12 S. W. Rep. 824, and numerous cases cited in § 98 of the late and exhaustive work of Judge Webb on Record of Title, from which I have borrowed freely for this article. Under the Virginia statute record of the deed is held necessary to a divestiture of the wife's title. Rohrer v. Roanoke Bank, 83 Va. 589; Sewall & Haymaker, 127 U. S. 719; Record of Title, § 186, and the general tenor of the early decisions was to the effect that the making out of the certificate of acknowledgment by the officer was a prerequisite to title passing. See Elliott v. Peirsoll, 1 Pet. 328. 339. The courts, however, have receded from this position. "The conveyance depends upon a proper acknowledgment of the execution of the deed, while the *registration* depends upon a proper certificate of the facts of acknowledgment." Hayden v. Moffatt (Tex.), 12 S. W. Rep. 820.

[7] Bagby v. Emberson, 79 Mo. 139. The courts have not been able to maintain this position, nor yet, with the former decisions and line of construction in their way, have they been able to determine what kind of equity is conveyed by a married woman's deed defectively acknowledged or certified.

[8] Mariner v. Saunders, 5 Gilne, 113; Drury v. Foster, 2 Wall. 24; s. c., 1 Dillon, 460; Webb on Record of Title, § 116.

[9] Berry v. Donley, 26 Tex. 746; Drury v. Foster, *supra;* McBeth v. Trabul, 69 Mo. 642; Lowells v. Daniels, 2 Gray, 161; Miller v. Shackelford, 3 Dana, 299; Williams v. Baker, 71 Pa. St. 476; Oglesby Coal Co. v. Pasco 79 Ill. 164; Huffman v. Huffman, 118 Pa. St. 458.

courts,[10] but yet adhered to in the main, has afforded a train of increasing evils and complications that can be checked and disposed of only by force of legislation, since courts like to be consistent even in error and are prone to invoke the doctrine of *stare decisis* in its support.

The making and signing of a deed, whether by a man or a woman, is the essential act in the conveyance of title. When the courts denied any validity whatever to the wife's deed, because not duly acknowledged and certified, it necessarily followed that such instrument, although sufficient in every other respect, and although acted upon as sufficient by the parties thereto, could nevertheless be treated as a nullity by any person, at any time and place; a naked trespasser might, when sued in ejectment by the owner, defeat the action if such a deed occurred anywhere in the owner's line of title; the wife herself could at any time sue for and recover the land, and without returning the purchase money paid her, because if the courts required this, and she had not the money, this would practically operate to divest her title without the separate acknowledgment, and in a manner which the statute had not authorized.[11] The construction thus adopted by the courts does not square itself with reason and justice, and is at practical variance with the property rights and consequent liabilities which the modern statutes have in so many other respects conferred upon the wife.[12] When confronted in given cases with the injustice and absurdities resulting from this early construction of the law, the courts have shrunk from its application; have sought to escape from its logical results, and have again and again involved themselves in contradictions that cannot be reconciled.[13] The doctrine of estoppel has in such cases been extended in varying degrees, and the principles of equity have been applied without uniformity, and as the exigencies of the situation required,[14] Validating statutes designed to heal defective acknowledgments have afforded one method of escape from the difficulty, and they have been vigorously upheld by the courts.[15] To the very logical objection that legislation cannot impair vested rights and divest a title which the deed failed to divest,[16] the courts have rather inconsistently though correctly answered that acknowledgment is a merely formal matter which the legislature could in the first instance have dispensed with entirely, and as to which it can subsequently give effect to any form it pleases.[17]

Remedy by Statute.—The evil has also been remedied in part by statutes authorizing proceedings in court to correct defective certificates of acknowledgment.[18] The most satisfactory statutory remedy, however, lies in the entire abolition of the requirement of privy examination, and this remedy has now been applied in a majority of the States.[19] Among

[10] The tendency of modern decisions, says Mr. Pomeroy, is to enforce estoppel against married women or against persons *sui juris*, even independently of legislation freeing their estates from all interest and control of the husband. 2 Eq. Jur., § 814, citing Bigslow v. Farr, 59 Me. 162; Drake v. Glover, 30 Ala. 382, and other cases. For cases sustaining the equities of persons holding under defective conveyances by married women, see Dalton v. Rust, 22 Tex. 134; Perry v. Perry, 99 N. C. 270; Urquhart v. Warnack, 53 Tex. 616; O'Keefe v. Handy, 31 La. Ann. 832; Homœpathic Co. v. Marshall, 32 N. J. Eq. (5 Stew.) 106; Clayton v. Frazier, 33 Tex. 92; Webb on Record of Title, § 102.

[11] Berry v. Donley, 26 Tex. 746: Drury v. Foster, 2 Wall. 24; Johnson v. Bryan, 62 Tex. 623.

[12] "The right of unrestricted acquisition, ownership and enjoyment of property is separate from the right and power of its unrestricted disposition only by the arbitrary force of law." Webb on Record of Title, § 100.

[13] See cases in note 10. Where the statute allowed the certificate to be impeached for fraud or "mistake on the part of the officer," *held* that this did not apply to the *form and manner* of taking the acknowledgment, and so parol proof was not admitted to contradict the certificate and show that the husband was in fact present, and that the officer did not explain the deed to the wife. Cox v. Gill, 83 Ky. 669; and so the court rejected proof to show that the wife's separate acknowledgment was in fact taken by telephone over a distance of three miles. Banning v. Banning, 80 Cal. 271.

[14] Compare, McHenry v. Day, 13 Iowa, 445; Goss v. Furman, 21 Fla. 406; Johnson v. Taylor, 60 Tex. 360; Clayton v. Frazier, 33 Tex. 92; Reis v. Lawrance, 63 Cal. 129. And see cases as to subsequent ratification by the wife, cited in Webb on Record of Title, § 119.

[15] Barnett v. Barnett, 15 Serg & R. 72; S. C., 16 Am. Dec. 518; Record of Title, §§ 23, 97, 120.

[16] Alabama Ins. Co. v. Barkin, 38 Ala. 510; S. C., 65 Am. Dec. 349.

[17] Dentzel v. Waldie, 30 Cal. 138. Such validating acts only give proper effect to contracts made by the wife fairly and in good faith, by which she intended but failed to pass the title to another merely because the proper legal forms were not observed. Watson v. Mercer, 8 Pet. 88.

[18] See an exhaustive discussion of the validity of a statute of this kind in Johnson v. Taylor, 60 Tex. 360; Webb on Record of Title, § 120.

[19] A married woman may now convey her separate property without privy examination in Alabama, Arizona, Colorado, Connecticut, District of Columbia, Georgia, Illinois, Indiana, Iowa, Kansas, Maine, Mary-

the States that have abolished the separate examination at a comparatively recent period are: Alabama, Colorado, Illinois, Iowa, Mississippi, New York and Missouri; the latter having just inaugurated the change by its Revised Statutes of 1889. The reform advances at an average rate of from one to two States each year, so that it is almost a matter of mathematical demonstration as to when this lingering relic of feudalism will have disappeared entirely.[20]

The Matter as in Reason and Actual Practice.—Aside from the injustice and the complications of law and equity resulting from the separte acknowledgment, there are other considerations of a practical nature demanding that it be dispensed with. As the matter does not fall within the national jurisdiction, uniformity among the States in the manner and particulars of the requirement is impossible. With our advancing civilization it is found that the ownership and transfer of property situated in one State, by persons residing or temporarily sojourning in another, becomes more and more common. The difficulties of getting an acknwledgment properly made and certified are increased by the fact that the law of the *situs* of the property, which usually controls in the case of realty, even as to the acknowledgment, provides a method and certificate of separte acknowledgment different from that familiar to the officer before whom the grantors may appear; and by reason of this, the expense, annoyance and delays of conveying property are greatly increased, even where serious loss does not occur. Simplicity and uniformity in the methods of conveyance has now become a matter of practical importance to our people. In this age of equal intelligence and equal property rights as between husband and wife, the latter does not require the protection designed in the privy examination; nor does such provision, however beneficent it may have been in ruder and more barbarous times, now afford any substantial measure of benefit. "It is believed that the malign influence of the husband, as it exists in modern times, is of such insidious character as that it cannot be successfully countervailed by the formality of a separate examination by a merely ministerial officer; and however commendable it may be as an abstract theory, that the law should desire to protect the wife against the protector of her own choice, yet as a matter of fact, the modern instances in which any actual protection or benefit has been afforded to her by reason of the separate acknowledgment are exceedingly rare, while those instances in which defects in the acknowledgments of married women have been availed of as a means for the perpetration of fraud, are unfortunately neither rare nor uncommon."[21]

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land, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, New Hampshire, New Mexico, North Dakota, Ohio, South Carolina, South Dakota, Utah, Vermont, Washington, Wisconsin and Wyoming. In a few of these States separate examination is required in conveyances of the exempted homestead, viz: Ala. (Code 1886, § 2508); Ariz. (Rev. Stats. 1887, Tit. 55, § 15); Wash. (Rev. Code 1881, § 344); Wyoming (Rev. Stats. 1887, § 2); and to relinquishments of dower in District of Columbia, Georgia (Code 1882, § 2706*a*), and South Carolina (Gen. Stats. 1882, § 1797). In Arkansas the wife may convey separate property acquired since October 13, 1874, as if *sole*. Criscoe v. Hambrick, 47 Ark. 235; Const. Art. 13, § 7. So in Tennessee, it has been recently held by the supreme court that the wife may convey her separate property without privy examination. Robertson v. Queen (Tenn.), 11 S. W. Rep. 38, with dissenting opinion. In a few other States, as Oregon, a deed by the wife, if executed without the State, may be valid without separate examination, by virtue of a statutory adoption of the rule of comity.

[20] The National Bar Association, at its last meeting, held at White Sulphur Springs, W. Va., August 1, 1889, recommended for legislative adoption by the several States a given form for the certificate of acknowledgment of instruments to be recorded. The second section provides that when a married woman unites with her husband in the execution and acknowledgment of any instrument, she shall be described in the certificate as his wife, but in all other respects her acknowledgment shall be taken and certified as if she were *sole*, and no separate examination shall in any case be requisite.

[21] Webb on Record of Title, § 9. That the tenor of the later decisions is not now towards a strict construction in favor of these formalities, see the recent and interesting case of Jonson v. Parker (Ark.), 11 S. W. Rep. 681, in which a relinquishment of dower was virtually held to be supplied by the operation of a general validating statute.

GARNISHMENT—DEBT DUE AND EXEMPT IN ANOTHER STATE.

MISSOURI PAC. RY. CO. V. SHARITT.

Supreme Court of Kansas, November 9, 1889.

Where an employee and resident of this State performs labor in this State for a railway company, a corporation of another State, but also doing business in this State, and the wages of such employee are exempt in this as well as in the other State: *Held*, in an

action by the employee to recover such wages in this State, the fact that the corporation has been garnished in such other State by a creditor of such employee before the bringing of this action in this State, and service of summons obtained upon the employee only by publication, is no defense to such an action.

Sharitt, plaintiff below, commenced this action on the 27th day of July, 1887, against the plaintiff in error, the Missouri Pacific Railway Company, to recover wages due him. The action was brought before a justice of the peace in Franklin county, and judgment was rendered against the defendant. An appeal was taken to the district court of Franklin county, and trial was had by the court, and the court made findings of fact and conclusions of law which are as follows: "(1) Plaintiff was in the employ of the defendant at Council Grove, Kan., during the month of June, 1887, performing manual labor in and about coupling cars and making up trains, and the like, and was styled a 'yard-master.' (2) As such laborer, he earned, and became and was entitled to receive from the defendant for such month's services, the sum of $79, $75 of which sum has not been paid. (3) That plaintiff is a citizen, resident, and householder of the State, and has been for more than two years last past. During said month of June, 1887, and ever since, the plaintiff had a family, to-wit, a wife and three children, supported by his labor, and his said earnings were necessary for the support of said family. (4) While the action was pending before the justice, it appeared that certain garnishee proceedings were pending in Morris county, Kan., whereby it was sought to subject said wages to the claim of a certan party there; and it was then agreed between the attorneys for the respective parties in this case that the suit here should be continued ten days, and that if, in the meantime, said garnishee proceedings were dismissed, the defendant would pay plaintiff's claim, or submit to judgment thereon, if plaintiff would pay costs. Accordingly, at the expiration of said ten days, said proceedings having been dismissed, the justice entered judgment accordingly. On the 13th day of July, 1887, at St. Louis, Mo., the defendant company was garnished by and before a justice of of the peace of that State at the suit of W. P. Stewart, a resident of Missouri, against said J. W. Sharitt, and ordered to answer therein, in which it did on July 28, 1887; and the company was, on September 29, 1887, ordered to pay into that court the amount so due the plaintiff. The plaintiff, Sharitt, defendant in that suit, was not served in said action otherwise than by publication. From the order so requiring said company to pay said moneys the said company appealed to the circuit court of St. Louis county Mo., which said action is now pending and undetermined. Neither party or their attorneys had notice or knowledge of these proceedings in St. Louis when the agreement referred to in the fourth finding was made. I conclude, as matter of law, that said personal earnings were and are exempt from the payment of plaintiff's debts, and that he is entitled to recover the same in this action; and judgment will be rendered accordingly." Judgment thereon was rendered for the plaintiff. Defendent now brings the case here.

CLOGSTON, C.: It is not contended that the claim sued on is not exempt under the exemption laws of this State, but it is contended that, because the garnishment proceedings were commenced in Missouri, and the court of that State obtained jurisdiction of the subject-matter before his suit was brought in Kansas, for the reason that the defendant company became liable under their answer in Missouri under said proceedings, and should not again be held liable in this State in this action. The plaintiff in error recognizes the rule laid down by this court, that, if the garnishment proceedings has been commenced in this State, no question could have been raised, and also recognizes the rule adopted in this State, that the garnishee has the same right in his answer to raise all the questions that the debtor himself might raise, and plead the exemption law as completely as the debtor might plead it; but plaintiff in error says no such rule exists in Missouri; that, under the decisions of that State, it is precluded from asserting this right, and therefore, if it is compelled to pay this judgment, it will again have to pay the claim under its answer in Missouri. This seems to present a hardship; but, as the claim is exempt under the laws of this State, and presumably exempt under the laws of Missouri,—for it is presumed, in the absence of any showing to the contrary, that the laws of Missouri are the same as the statute of this State; and, therefore, if this claim is exempt under both the laws of Missouri and of Kansas, it would be unjust to the defendant in error if, by reason of some construction of the statute of Missouri, he should be prevented from securing the benefit of the exemption. It has been held in this State that the garnishee may plead the exmption laws, and be protected thereby as completely as the debtor would be. See Mull v. Jones, 33 Kan. 112, 5 Pac. Rep. 388. This seems to be the well-recognized doctrine elsewhere; and, while there is some conflict in the authorities on this subject, the great weight of authority is with our court. We see no reason why an exception should be made in this case to a rule so well established. Under the rule laid down in Railway Co. v. Maltby, 34 Kan. 131, 8 Pac. Rep. 235, and Railroad Co. v. Gough, 35 Kan. 1, 10 Pac. Rep. 89, this judgment must be affirmed. See, also, Drake v. Railway Co., 37 N. W. Rep. 70. Under those decisions, this claim would be exempt to the plaintiff below had he resided either in the State of Missouri, or, as he does, in Kansas; and such exemption ought to be a good defense for the defendant company in Missouri. It is therefore recommended that the judgment of the court below be affirmed.

VALENTINE, J.: I concur in the decision of this

case for the reason that I believe it is sustained by reason and weight of authority. It seems to be generally held that the laws of any country, where a debt is created enter into the contract upon which the debt is founded, so far as they are applicable and material, and form a part thereof. Greer v. McCarter, 5 Kan. 18, 22; Deering v. Boyle, 8 Kan. 532 *et seq.*, and cases there cited. Also, in the absence of anything to the contrary, it will be presumed by the courts that the laws of all other States are similar to their own. Furrow v. Chapin, 13 Kan. 107; Dodge v. Coffin, 15 Kan. 285 *et seq.*, and cases there cited; Railway Co. v. Cutter, 16 Kan. 568; Baughman v. Baughman, 29 Kan. 284. And, when the *situs* of a debt is changed from the State or jurisdiction in which the debt was created to some other State or jurisdiction, all its incidents and conditions materially affecting it will be transferred with it, and its interpretation, scope, and validity will be governed by the *lex loci contractus*. For instance, if the debt is exempt from judical process in the State where it is created, the exemption will follow the debt, as an incident thereto, into any other State or jurisdiction into which the debt may be supposed to be carried. Drake v. Railway Co., 69 Mich. 168, 37 N. W. Rep. 70; Wright v. Railroad Co., 19 Neb. 175, 27 N. W. Rep. 90; Baylies v. Houghton, 15 Vt. 626; Pierce v. Railway Co., 36 Wis. 283, And see especially, the opinion in the case of Railway Co. v. Maltby, 34 Kan. 125, 128, 8 Pac. Rep. 235 *et seq.* In the language of the Michigan case above cited, the exemption of the debt from judical process "becomes a vested right *in rem.* which follows the debt into any jurisdiction where the debt may be considered as going." Also, the *situs* of a debt is either with the owner thereof or at his domicile, or where the debt is to be paid; and it cannot be subjected to a proceeding in garnishment anywhere else. See the numerous authorities hereafter cited, commencing with the case of Railroad Co. v. Dooley, 78 Ala. 524. I shall now proceed to consider this case with reference to its facts.

The Missouri Pacific Railway Company, a Missouri corporation doing business in Missouri and Kansas and other States, and operating over 2,000 miles of railway in Kansas, owes a debt, not evidenced by any instrument in writing, to J. W. Sharitt, a resident of Kansas, for wages earned by him as yard-master for the railway company at Council Grove, Kan., and presumably payable at that place, which wages are, under the law of Kansas, and presumably under the laws of Missouri, as nothing appears to the contrary, exempt from execution, attachment, garnishment, and other process. W. P. Stewart, a resident of Missouri, who puts forth the claim that Sharitt owes him, instituted a garnishment proceeding before a justice of the peace of that State against the railway company to procure the payment to him of the debt which the railway company owes to Sharitt. Such proceeding is now pending in the circuit court of St. Louis, Mo. No service of summons were ever made upon Sharitt in that case except by publication. The question now arises, and it is the principal question involved in this case, whether Sharitt is bound by such garnishment proceedings or not. Now, unless the Missouri court has jurisdiction of Sharitt, or of something belonging to him, of course, the proceeding is void as to him; and, as no personal service or summons was even made upon him, it will be admitted that the proceeding is without jurisdiction and void as to him personally. But the further question remains, is the proceeding without jurisdiction and void as to any property belonging to Sharitt? Or, in other words, has the Missouri court any jurisdiction, as against Sharitt, over the debt which the railway company owes to Sharitt? Sharitt is not a resident of Missouri, nor is he in that State; but, on the contrary, he is a resident of Kansas, and in Kansas, and he has never been served personally with any summons in the garnishment proceeding. The debt is not evidenced by any written instrument; but, if it were, the instrument would presumbly be in Kansas, and in the hands of Sharitt. It is not payable in Missouri, but, on the contrary, it is presumably payable in Kansas, where it was created, and where Sharitt resides; and in Kansas, and presumably in Missouri, it is exempt from all judicial process. It is not claimed that the railway company has ever set apart any fund, either in Missouri or in Kansas or elsewhere, for the purpose of paying this particular debt. Hence there is no specific fund connected with this debt, nor any tangible thing to which any jurisdiction could attach. But, if it should be supposed that any particular fund had been set apart to pay this debt, then it should be supposed that it was so set apart in Kansas, as the debt was created in Kansas, is already due in Kansas, and is payable in Kansas; and probably the railway company could not set apart a fund in Missouri so as to defeat Sharitt's claim in Kansas. The debt is really and in fact a mere chose in action, resting wholly in parol, and is of such an intangible character that it could not be actually seized by any kind of process. And it can hardly be said to have any actual *situs* anywhere; but, if it should be considered as having any actual *situs* anywhere, then its more natural *situs* is where it is to be paid,—in Kansas, and to Sharitt. It is seldom, and perhaps never, held that the property in a debt, a mere chose in action, can be carried around with the debtor wherever he may go, and exist wherever he may be. Drake, Attachm. §§ 474, 481; Wade, Attachm. § 344; Wheat v. Railroad Co., 4 Kan. 370. But, on the contrary, the *situs* of a debt is generally held to be with the creditor, or at his domicile, or at the place where it is made payable. It is the creditor that owns the debt, and not the debtor; and the *situs* of the debt must be considered as being either with the owner or at his domicile, or where it is to be paid. Indeed, the more natural *situs* of any

contract, whether a debt or not, would seem to be where it is to be performed. Even tangible property is not subject to garnishment proceedings in a State or jurisdiction in which the property is not situated. See the above authorities, and also Bates v. Railway Co., 60 Wis. 296, 304, 305, 19 N. W. Rep. 72. See, also, Sutherland v. Bank, 78 Ky. 250. Now, under the facts of this case, we do not think that the Missouri court has any jurisdiction either of Sharritt, or of anything belonging or appertaining to him; and hence the garnishment proceeding is void as to him. We think the weight of authority sustains this view of the case. See the authorities already cited, and also the following: Railroad Co., v. Dooley, 78 Ala. 524; Lovejoy v. Albee, 33 Me. 414; Lawrence v. Smith, 45 N. H. 533; Miller v. Hooe, 2 Cranch C. C. 622; Hamilton v. Rogers, 67 Mich. 135, 34 N. W. Rep. 278; Drake v. Railway Co., 69 Mich. 168, 37 N. W. Rep. 70; Baslies v. Houghton, 15 Vt. 626; Towle v. Wilder, 57 Vt. 622; Wright v. Railroad Co., 19 Neb. 175, 27 N. W. Rep. 90; Pierce v. Railway Co., 36 Wis. 283; Tingley v. Bateman, 10 Mass. 343; Nye v Liscombe, 21 Pick. 263; Sawyer v. Thompson, 4 Fost. (N. H.) 510; Railroad Co. v. Thornton, 60 Ga. 300; Green v. Bank, 25 Conn. 452; Cronin v. Foster, 13 R. I. 196; Bates v. Railroad Co., 4 Abb. Pr. 72; Willet v. Insurance Co., 10 Abb. Pr. 193; Noble v. Oil Co., 79 Pa. St. 354; Myer v. Insurance Co., 40 Md. 595; Wheat v. Railroad Co., 4 Kan. 370. As before stated, it is not the debtor who can carry or transfer or transport the property in a debt from one State or jurisdiction into another. The *situs* of the property in a debt can be changed only by the change of location of the creditor who is the owner thereof, or with his consent.

It will be seen from what has been said that my concurrence in the decision in this case is founded almost wholly upon the theory that the Missouri court has no jurisdiction of Sharitt, or anything belonging or appertaining to him, and therefore that there can be no such thing as a *lis pendens* by virtue of the Missouri proceeding, with regard to the subject-matter of this action, which is the debt, and nothing in the Missouri proceeding that can be considered as valid or binding as against Sharitt. And all my argument is also based upon the theory that the court first obtaining jurisdiction of the subject-matter of an action has the superior right to exercise jurisdiction over such subject-matter. But, not wishing to be misunderstood in this case, I will be a little more explicit as to some matters. I think that the Missouri court has jurisdiction of Stewart, the plaintiff in the Missouri action, and of the railway company, the garnishee; and that any judgment or order which might be rendered or made by the Missouri court as against Stewart or the railway company would be valid and binding as against them. And if Stewart, the plaintiff in that action, had obtained personal service of summons in Missouri upon Sharitt, then any judgment or order which might be rendered or made by the Missouri court as against Sharitt, or against the garnishee, would also be valid and binding as to Sharitt. And even without personal service of summons upon Sharitt, if he had any tangible property in Missouri which the Missouri court could seize, even money in the hands of some other person, any judgment or order of such court which might be made or rendered after the seizure of such property would be valid as against Sharitt. And, further, if it could be considered that the debt owing by the railway company to Sharitt had a *situs* in Missouri, then any judgment or order made or rendered by such court respecting such debt would be valid; and, if Sharitt were a resident of Missouri, or was even temporarily there, at the time of the attempted seizure of the debt, or if the debt was made payable in Missouri, it might perhaps be considered that the debt had such a *situs* in Missouri that it might be subject to the order or judgment of the Missouri court. But none of these things exist in this case; and hence, in my opinion, the Missouri court has no jurisdiction of Sharitt, or of anything appertaining or belonging to Sharitt. Of course, the laws of a State can have no extraterritorial force; and, therefore, if exempt tangible property, such as could be seized by process, were carried into another State or jurisdiction, such property might cease to be exempt, and might be seized and held in attachment or garnishment proceedings for the payment of debts, but debts existing in Kansas are not at the same time that kind of property in Missouri. Whether what we have just said with respect to tangible property would apply to debts created under contracts made under laws exempting such debts from all judical process, it is not necessary, in this case, to express any opinion. But, generally, contracts with respect to everything of substance inhering in them—and the laws of the country where the contracts are made, so far as such laws affect the contracts, are generally considered as inhering in the contracts—are governed and determined by the *lex loci contractus*, in whatever jurisdiction the construction or character of such contracts comes into consideration. Several cases are referred to as enunciating doctrines adverse to the views herein expressed, to-wit: Furguson v. Bank, 25 Kan, 333; Railroad Co., v. Thompson, 31 Kan. 180, 1 Pac. Rep. 622; Zimmerman v. Franke, 34 Kan. 650, 9 Pac. Rep. 747; Stark v. Bare, 39 Kan. 100, 17 Pac. Rep. 826; Daniels v. Clark, 38 Iowa, 556; Moore v. Railroad Co., 43 Iowa, 385; Lieber v. Railway Co., 49 Iowa, 688; Mooney v. Railway Co., 60 Iowa, 346, 14 N. W. Rep. 343; Green v. Van Buskirk, 7 Wall. 139; Conner v. Insurance Co., 28 Fed. Rep. 549; Morgan v. Neville, 74 Pa St. 53; Osborne v. Schutt, 67 Mo. 712; Blake v. Williams, 6 Pick. 285; Sturtevant v. Robinson, 18 Pick. 175; Railroad Co., v. May, 25 Ohio St. 347; Snook v. Snetzer, *Id.* 516; Railroad Co., v. Kennedy, 83 Ala. 462, 3 South. Rep. 852. Scarcely any of the above cases have any application to the question whether a court of one State, by virtue of a garnishment

proceeding against a resident garnishee, against a non-resident and absent defendant, residing in another State, and owing a debt created and payable to him in his own State, and by virtue of a service of summons upon the defendant only by publication, could obtain sufficient jurisdiction over the non-resident and absent defendant, or over the debt created and payable to him in the State of his residence, that such court could render a judgment or make an order against the garnishee that would be valid and binding as against the defendant. The case of Railroad Co., v. Thompson, 31 Kan. 180, 1 Pac. Rep. 622, is relied upon principally among the Kansas cases; but no such question was presented or decided in that case. In the opinion in that case, it is said, among other things: "Again, no question arises here as to the effect of a judgment against the garnishee in the courts of this State, as against proceedings to collect the debt in the State of Nebraska, where the debt was created. As to that question, the cases of Pierce v. Railroad Co., 36 Wis. 283, and Moore v. Railroad Co., 43 Iowa, 385, *supra*, seems to be divergent. As to which States the law correctly, we need not now inquire. The question in this case is not what is the effect of a judgment against a garnishee, but what ought to be such judgment." 31 Kan. 194, 1 Pac. Rep. 622. In the leading Iowa case of Moore v. Railroad Co., 43 Iowa, 385, jurisdiction was conceded. See opinion, p. 387. This was also the case in the case of Railroad Co. v. May, 25 Ohio St. 347. In that case, jurisdiction was admitted by the pleadings. In the case of Blake v. Williams, 6 Pick. 285, the question was not one of jurisdiction, but one of assignment. Besides, the actual *situs* of the debt in that case was, in all probability, just where the proceedings were commenced. The debt was probably payable there. The case of Green v. Van Buskirk, 7 Wall. 139, has no application to this case. No debt was attempted to be taken in attachment or garnishment in that case. The case of Connor v. Insurance Co., 28 Fed. Rep, 549, has perhaps some application to this case, though it certainly does not furnish much authority against the views herein expressed. It also criticises unfavorably the decision made by this court in the case of Railroad Co. v. Thompson, 31 Kan. 180, 1 Pac. Rep. 622. The case of Morgan v. Neville, 74 Pa. St. 52, is probably applicable. And yet the owner of the debt in that case was served personally with notice the next morning after the garnishment proceeding was instituted. This service of notice, however, was probably, for reasons not necessary to mention, not sufficient to give the foreign court jurisdiction. In the case of Railroad Co. v. Kennedy, 83 Ala. 462, 3 South. Rep. 852, the owner of the debt was served personally with summons in the foreign jurisdiction. It is unnecessary to mention more particularly the other cases cited for the railway company.

The principal argument urged against holding that the railroad company is liable in the present case is that by such holding, and by the possible judgment of the Missouri court, the company might be required to pay the debt twice. This would certainly be wrong but wherein would the wrong consist? If this court is right, should it refrain from doing its duty because of some possible wrong somewhere else? Should this court violate its own laws because some foreign court may ignore them? Besides, is the railroad company the only party entitled to sympathy? Is not the owner of the debt, with his family, also entitled to some consideration? The debt is his personal earnings, for his own personal services for less than three months—indeed, for less than one month—next preceding the issuing of the garnishment process, and is necessary for the support of his family, and by the laws of his own State, is exempt from the payment of his debts, and from all judical process. Now, not withstanding the fact that this fund is set apart by the State for the support of himself and family, and is necessary for their support, may it be taken away from them by a foreign jurisdiction four or five hundred miles away,—and it might be thousands of miles away,—and, possibly, upon some false or trumped-up charge, without any personal service of summons upon him? Is he not entitled to have his day in court, and in a court that has first rightfully obtained jurisdiction of him personally, or of his debt? If it be said that the garnishee should serve notice upon him, then what is such notice for? Is such notice necessary in order to give the foreign court jurisdiction of the owner of the debt, or of the debt? Will it be admitted that, without such a notice from the garnishee, the judgment or order rendered or made by the foreign court would be without jurisdiction and void as to the owner of the debt, and still claimed that, with such notice, such judgment or order would be valid and binding as to him? Besides, the garnishee might be unable to give the notice; and, if he could not, then what? I would hardly think that such a notice could give jurisdiction to the foreign court, if it did not have jurisdiction prior to that notice. Besides, why compel the owner of the debt, upon such a notice, to go four or five hundred miles or more to defend an action, and thereby spend more money than the amount of his debt? It might be better for him and his family to lose the debt entirely, and let the laws of the State setting it apart for the benefit and support of himself and family become nugatory and inoperative. Of course, the debt in this case is small —only $75; but it is a great deal to the laborer who earned it, and his family, and the State has set it apart for the support of his family; and the principle as to jurisdiction is the same as though the debt amounted to many thousands of dollars. If the rule contended for by the railroad company should be adopted, then it would be prudent for every creditor to continually watch his debtor, and to follow him around into every

jurisdiction into which he might go, for fear that some unscrupulous person, who really had no just claim, might institute a garnishment proceeding and obtain the debt before the creditor could have an opportunity to prevent it. I concur in affirming the judgment of the court below.

NOTE.—HORTON, C. J. (*dissenting.*) When the judgment of affirmance was rendered in this court, I had grave doubts whether the law had been properly declared. Since then, I have re-examined the facts disclosed by the record, the decisions referred to by the attorneys, and the authorities in the opinions heretofore filed. My opinion now is that a rehearing should be granted, and that the judgment of the trial court should be reversed. My reasons are as follows:

It appears that Sharitt, the employee, during the month of June, 1887, performed manual labor for the Missouri Pacific Railway Company, which system extends through Missouri and Kansas. For these services the railway company owed its employee wages,—a debt. These wages are exempt from attachment or garnishment under the laws of this State. W. P. Stewart, a creditor of Sharitt, who resided in St. Louis, Mo., brought an action against him by attachment in St. Louis on the 13th day of July, 1887, and garnished the railway company, which answered on July 28, 1887, to the facts of its indebtedness to the employee; and, upon its answer, judgment was rendered against the company. The employee was served by publication. From the order of judgment requiring the company to pay the wages or debt to the creditor, the company appealed to the circuit court of St. Louis, Mo., where the action is now pending. Subsequent to the commencement of the action by attachment in St. Louis, Mo., and on the 27th day of July, 1887, Sharitt commenced his action before a justice of the peace in Franklin county, of this State, to recover the same wages or debt which had been garnished in St. Louis, Mo. The justice of the peace rendered judgment against the railway company. The company took an appeal to the district court of Franklin county, and that court also rendered judgment in favor of the employee, and against the railway company. This is complained of.

The question in the case therefore is, can the employee of the railway company bring his action in this State, and recover his wages, notwithstanding the defendant company has been garnished for the same wages by the employee's creditor in Missouri? Although the amount in dispute is small, the principles involved are important. Several great lines of railroad, like the Atchison, the Missouri Pacific, the Rock Island, and others, extend through this into other States. These railroads have thousands of employees in their service, whose wages are liable to be garnished, and the law ought not to compel them to pay for the services of an employee twice,—once to the creditor, and afterwards to the employee. Again, many of the employees of these railroads go from State to State in search of work, and often change their employer as well as their residence. These wage workers ought to be protected in the payment of their personal earnings to themselves, which generally are exempt under the statutes of most of the States, so far as the law will permit. "The laborer is worthy of his hire." If the railway company is compelled to satisfy the judgment rendered against it in Missouri, then the employee ought not to recover, and the action commenced in this State should be delayed until the final disposition of the attachment or garnishee proceedings in Missouri. Ferguson v. Bank, 25 Kan. 333. "Of course, no debtor should be required to pay his debt twice; but, at the same time, if he goes into a State outside the State of his residence, and transacts business therein, he must expect, as to all matters of procedure and remedy, to abide by the laws of that State. * * * It cannot be doubted that the courts of the State where he resides will respect a judgment rendered against him, in this State, provided he has made a perfect and full disclosure, and a reasonable defense, against the claim presented." Railroad Co. v. Thompson, 31 Kan. 180, 1 Pac. Rep. 622. Kent says: "A *lis pendens*, before the tribunals of another jurisdiction, has, in cases of proceedings *in rem*, been held to be a good plea in abatement of a suit. Thus, where a creditor of A, a bankrupt, had, *bona fide* and by regular process, attached in another State a debt due to A, and in the hands of B, it has been held that the assignees of the bankrupt could not, by a subsequent suit, recover the debt of B. The pendency of the foreign attachment is a good plea in abatement of the suit. In such a case, the equity of the maxim, *qui prior est tempore, potior est jure*, forcibly applies. Unless the plea in abatement was allowed in such a case, the defendant would be left without protection, and would be obliged to pay the debt twice." 2 Kent Comm. 122, 123, 125. See Morgan v. Neville, 74 Pa. St. 52; Thomp. Homest. & Ex. §§ 21-23; Connor v. Insurance Co., 28 Fed. Rep. 549; Freem. Ex'ns (2d ed.) § 209; Thomp. Homest. & Ex. § 23. Pierce v. Railway Co., 36 Wis. 283, is in conflict with some of the foregoing decisions, but that case has been severely criticised. 2 Cent. L. J. 378. But, upon examination, that case does not, I think, militate against the conclusion I have reached. It is said in that case: The garnishment must bring the fact of the exemption to the notice of the court where the attachment is pending, or notify the employee of the pendency of the proceedings. In the State of Missouri, the supreme court holds that the exemption of property from judicial process is a personal privilege of its owner, and that the debtor of such owner cannot assert it for him by way of a defense to a garnishment proceeding. Osborne v. Schutt, 67 Mo. 712. Therefore, the railway company could not, under the decisions of Missouri, have protected itself or its employee by alleging the exemption of the wages attached. As the attachment proceedings are still pending in Missouri, the employee has notice now of these proceedings, even within the Wisconsin rule, the garnishee has done all that it could do. If the law is decided otherwise, it is manifest that the railroad company will be subjected to a double liability, which does not comport with justice.

It is argued in the concurring opinion that, as Sharitt is not a resident of Missouri, and has not been personally served with any summons in the garnishment proceeding, the action in Missouri by Stewart, a resident of Missouri, and the creditor of Sharitt, against the Missouri Pacific Railway Company, a Missouri corporation, is void as being without jurisdiction, and therefore that the garnishment proceeding is no defense to the action of Sharitt in this State. This view of the law is not, I think, sustained by the weight of the authorities. Drake, in his work on Attachment, § 597, says: "Where the garnishee is indebted, it will not vary his liability that his contract with the defendant is to pay the money in another State or country than that in which the attachment is pending. Thus, where it was urged as a ground for

discharging a garnishee, that his debt to the defendant was contracted in England, and was payable there only, so that the defendant could not, and therefore the plaintiff could not, make it payable elsewhere, the court said: 'We do not perceive any legal principle upon which the objection rests. This was a debt from the garnishee everywhere, in whatever country his person or property might be found. A suit might have been maintained by the defendant here, and therefore the debt might be attached here.'" In Blake v. Williams, 6 Pick. 286, it was held that "where W, a banker in England, having advanced money to pay a bill of exchange drawn upon him by M, a citizen of this State, became a bankrupt, and after an assignment of his effects by commissioners of bankruptcy, but before notice of it had reached this country, the debt due from M (he not having remitted funds to replace the money advanced) was attached in his hands, by virtue of our trustee process, by B, a citizen of this State, and a creditor of the bankrupt, the attachment was held valid as against the assignment." In the opinion in that case it is said: "By our law the service of a trustee process upon one who is indebted to the defendant in the suit creates a lien upon the debt in favor of the plaintiff in the action, so that, if he recovers judgment against the principal, he shall have execution against the trustee to the amount of the effects in his hands, or the debt which he owes; and no distinction is made, in the application of this law, between citizens who may be trustees of other citizens, and those citizens who may be indebted to a person residing in a foreign country, who is indebted to citizens of the United States." In Railroad Co. v. May, 25 Ohio St. 347, it was decided that, "in an action to recover money due on contract, it is a sufficient defense to show that the money sought to be recovered has been attached by process of garnishment duly issued by a court of a sister State, in an action there prosecuted against the plaintiff by his creditors, although it appear that the plaintiff and such creditor are all residents of this State." So, where the debt was contracted where the garnishment took place, but the garnishee agreed to pay the money in another State, he was nevertheless charged. Sturtevant v. Robinson, 18 Pick. 175. See, also, Leiber v. Railroad Co., 49 Iowa, 688; Mooney v. Railroad Co., 14 N. W. Rep. 343.

The concurring opinion, it seems to me, attempts to establish a rule which ignores the fact that the proceedings in garnishment in Missouri are entitled to full faith and credit as a judgment of a sister State, and that, being proceedings *in rem*, and the debt being condemned by a court having jurisdiction, the judgment cannot be contested in this State. Stewart, the creditor in the garnishment proceedings, is a resident of Missouri. The Missouri Pacific Railway Company is a corporation of Missouri. At the time of the garnishment proceedings that corporation owed money to J. W. Sharitt. Sharitt was duly served by publication. The court of Missouri had jurisdiction both of Stewart and the railway company, and had full authority to condemn any money owing by that company to any one of its employees, whether residents, or non-residents, if payable in Missouri. "Every country [State] may regulate as it pleases the disposition of personal property found within it, and may prefer its attaching creditor to any foreign assignee; and no authority has a right to question the determination." Blake v. Williams, *supra*. This point was expressly decided in Connor v. Insurance Co., *supra*. The syllabus in that case is as follows: "The defendant, an insurance company under the laws of New York, but doing business also in Illinois and Michigan, became indebted to the nominal plaintiff, a resident of Michigan, for a loss under one of its policies, which loss was, after adjustment, assigned by her to the actual plaintiff, also a resident of that State. Creditors of the nominal plaintiff, citizens of Illinois commenced suit in that State by attachment against her, and garnished the defendant there. Subsequently to the service of garnishment in Illinois, the assignee of the plaintiff began suit against the defendant in Michigan, and obtained judgment before the case in Illinois was tried. Judgment was soon afterwards had in Illinois. Held (1) that, as a general rule, the *situs* of a debt is either at a domicile of the creditor, or at the place where it is payable; (2) that, under the laws of Illinois, suit having been first commenced there, and the courts of that State having obtained by garnishment control of the subject-mattter, there was no jurisdiction in the courts of Michigan." Of course between courts of concurrent jurisdiction, the court first acquiring jurisdiction will retain, and the other will not interfere with it. The courts of Missouri first acquired jurisdiction of the debt or money due to Sharitt, and the courts of this State ought not to interfere in that case until the cause is finally disposed of.

If the rule is established as stated in the opinion, then the railway company is twice liable for the same debt,—once to Stewart, the creditor in Missouri, and then, again, to Sharitt in this State. The company has done and is doing all it can to defeat and escape any liability in the garnishment proceeding. It has appealed from the judgment of the justice of the peace of St. Louis to the circuit court of St. Louis county, and has notified Sharitt of the pendency of the garnishment proceedings. The company is helpless. In Missouri, exemption is a personal privilege. The company cannot assert the exemption for Sharitt. Osborne v. Schutt, *supra*. Sharitt can alone exercise this personal privilege. If he will assert his rights in the Missouri court, the debt or money will be declared exempt. It all lies with Sharitt. Under the circumstances, ought the company to pay twice, when the action of Sharitt will prevent any judgment against him or the railway company in Missouri? Ought the railway company to suffer a double liability because Sharitt refuses to answer in a case in which he has been served by publication, and in which he has been personally notified by the railway company? I think not. It is stated in one of the foregoing opinions that "the debt is really and in fact a mere chose in action, resting wholly in parol, and is of such an intangible character that it could not be actually seized by any kind of process; and it can hardly be said to have any actual *situs* anywhere." *Ante*, 432. It is further stated in one of the opinions that "I think that the Missouri court has jurisdiction of Stewart, the plaintiff in the Missouri action, and of the railway company the garnishee, and that any judgment or order which might be rendered or made by the Missouri court as against Stewart or the railway company would be valid and binding as against them." *Ante*, 432. It was said by Mr. Justice Brewer in Railroad Co. v. Thompson, 31 Kan. 180, 1 Pac. Rep. 622, that "a mere debt is transitory, and may be enforced wherever the debtor or his property can be found; and, if the creditor can enforce the collection of his debt in the courts of this State, a creditor of such creditor should have equal facilities." I think that Sharitt, as a creditor of the railway company, could have enforced the collection of his debt in the courts of Missouri; and, if he could have an action in that State, his creditor is entitled to

equal facilities. It is not shown anywhere in the record that the debt was payable in the place or county where Sharitt performed his labor; and if the decision is carried to its logical results, Sharitt should have brought his suit at Council Grove, or in the county where he worked, and not in Franklin county. If his debt was created in Morris county, according to the decision, it was payable in Morris county; and therefore, according to the decision, he had no right to bring his action to Ottawa. This, however, is not the law. "A mere debt is transitory, and may be enforced wherever the debtor or his property can be found."

If it be decided by this court, under the facts of this case, that the Missouri court has no jurisdiction either of Sharitt or any thing belonging to him, or of any money due to him, and that therefore the garnishment proceeding in Missouri is void as to him, then there can be no garnishment of a person in this State owing a debt to a person residing in another State. The practice among the profession is contrary to this decision. Very often persons in this State owing debts to non-residents are garnished by the creditors of the non-residents in this State, and the only service had on the non residents is by publication; being the same service had in the Missouri court upon Sharitt. Sections 28 54, pp. 702-706, Comp. Laws 1885. Section 72 of the Civil Code of this State expressly provides, the same as the Missouri Code, that "service may be made by publication in * * * actions brought against a non-resident of this State, or a foreign corporation, having in this State property or debts owing to them, sought to be taken by any of the provisional remedies, or to be appropriated in any way." I think, however, that this court is foreclosed by its previous decisions, and that the rule stated in the concurring opinion cannot be adopted unless the prior cases are overruled.

In Railroad Co. v. Thompson, 31 Kan. 180, 1 Pac. Rep. 622, the railroad corporation was organized, and had its principal place of business, in Nebraska, but its line extended into this State. It was garnished in the courts of this State for a debt due to one of its employees for wages, at the suit of the creditor of the employee. The employee resided in Nebraska, had earned his wages there, and those wages were exempt to him and his family by the laws of that State. No service of process was had on the principal defendant. It did not appear where the plaintiff resided. The able district judge of Atchison county (Judge Martin) held in that case "that under our statute, when a railroad company incorporated under the laws of a sister State leases a line of railroad in this State, and keeps local agents, and operates its lines, within this county, it is liable to the process of a garnishment here for all indebtedness which may be owing to a defendant, although, by the usual course of its business, such indebtedness is payable at the principal office of the corporation in the sister State; the corporation, in such case, being an inhabitant of this State for the purpose of business, and the service of process upon it, and the indebtedness not being of a local character, but enforceable in any jurisdiction in which service may be had." The railroad company prosecuted its writ of error to this court, and expressly made the point "that a foreign corporation cannot be garnished in this State, as the debtor of a non-resident, for a debt contracted and payable in a foreign State, by service on a servant or on the officers of the corporation." The judgment of the trial court was affirmed, Mr. Justice Brewer, speaking for the court said: "He [the plaintiff] is a citizen of Kansas, appealing only to the laws and the courts of this State for the collection of his debt, and simply denying that the laws of another State shall prevent the collection of his debt according to the laws and procedure of his own State." The syllabus states the following proposition of law: "A foreign corporation coming into this State, and leasing property and doing business here, may be garnished for a debt due to one of its employees, although such employee is not a resident of this State, and although the debt was contracted outside of the State." At the time of the rendition of this decision, the members of this court were Mr. Justice Valentine, Mr. Justice Brewer, and the writer. Mr. Justice Brewer delivered the opinion in this case. All of the justices concurred in affirming the judgment of the trial judge.

In Zimmerman v. Franke, 34 Kan. 650, 9 Pac. Rep. 747, Franke was perpetually enjoined from prosecuting garnishment proceedings in Nebraska against the Missouri Pacific Railway Company by Zimmerman, who was indebted to Franke, and who had personal earnings coming to him from the railway company. Both Franke and Zimmerman resided in Atchison, in this State; but Zimmerman was an employee of the railway company, running between Kansas City and Omaha. He was head of a family. Zimmerman was not personally served with any process in or from Nebraska, and Franke was proceeding, before the injunction, to collect his claim against Zimmerman, by garnishment in Nebraska, from the Missouri Pacific Railway Company. If the garnishment proceeding in Nebraska was without jurisdiction and void as to any debt or money coming or belonging to Zimmerman, why was this court asked to interfere with its strong arm to forbid Franke from carrying on a void and useless proceeding in Nebraska? That decision, as I understand it, was rendered upon the theory that, if Franke was permitted to prosecute his proceedings by garnishment in Nebraska, he would thereby deprive Zimmerman of his personal earnings, which were exempt under the laws of this State.

In Stark v. Bare, the latter was a married man, living in this State, and engaged in the service of the Atchison, Topeka & Santa Fe Railroad Company. He was indebted to Stark; and Stark, to evade the exemption laws of this State, sold his claim to John W. Leatherbury, of Kansas City, Mo., for the purpose of permitting Leatherbury to bring an action in Missouri, by garnishment against the railroad company, to appropriate the personal earnings due from the railroad company to Bare. This court sustained a judgment in favor of Bare against Stark upon the ground that the garnishment proceedings instituted by Leatherbury against the railroad company in Missouri deprived Stark of his personal earnings from the railroad company. This decision was also rendered upon the theory that the garnishment proceedings of Missouri deprived Bare, the employee, of the debt due from the railroad company to him in Kansas. Both of these decisions follow Snook v. Snetzer, 25 Ohio St. 516.

In Railroad Co. v. May, *Id.* 347, it was decided, as already stated, that, "in an action to recover money due on contract, it is a sufficient defense to show that the money sought to be recovered has been attached by process of garnishment, duly issued by a court of a sister State, in an action there prosecuted against the plaintiff by his creditors, although it appear that the plaintiff and such creditors are all residents of this State."

I do not think the decisions cited in the opinion, and in the concurring opinion, adversely to the views herein expressed, have very much application to this case.

In the case of Railway Co. v. Maltby, 34 Kan. 131, 8 Pac. Rep. 235, and Railroad Co. v. Gough, 35 Kan. 1, 10 Pac. Rep. 89, about all that was decided was that, where the debt of the garnishee to the defendant is by the laws of Kansas and Missouri exempt, the debt is exempt in this State from garnishment, and no distinction is to be made between residents and non-residents. In Bates v. Railway Co., 60 Wis. 296, 19 N. W. Rep. 72, a car-load of hogs was attempted to be attached by garnishment. It was held in that case that "property outside of the State is not the subject of garnishment under our statute, and that a common carrier cannot be held liable as a garnishee for goods in actual transit when the process is served." In Sutherland v. Bank, 78 Ky. 250, a carload of oats was attached, and the attachment was held wrongful, because the oats was beyond the jurisdiction of the court. In Wheat v. Railroad Co., 4 Kan. 370, an attempt was made to attach or garnish $300,000 of Leavenworth bonds, which were in the State of Missouri, and in the possession of the treasurer of the railroad company. Many of the other decisions cited in the concurring opinion are like these. Of course, no one contests but that these are the law as to the points decided; but the *situs* of personal property, like "hogs, oats, and bonds," is somewhat different to the *situs* of debts owing to employees and other persons.

In Wright v. Railroad Co., 19 Neb. 176, 27 N. W. Rep. 90, the case was very similar to Railway Co. v. Maltby, *supra*, and disposed of the same way; that decision being fully cited and approved. Something, however, was said in that decision, and in several of the other cases cited, about debts not being liable to garnishment where the corporation or person garnished is not owing the debtor money payable in the State where the proceedings are commenced. Again, some of these decisions go to the effect that debts are local, and remain at the residence of the debtor. I need not review these cases, because they do not meet the question presented as to the jurisdiction of the Missouri court, under the laws of that State, over the debt of the railway company due to Sharitt. They are nearly all cases where the garnishment proceedings have been commenced and disposed of in the States where the decisions have been rendered. The decisions are constructions of garnishment laws of the State where the decisions have been rendered. The question whether proceedings in garnishment of a sister State are entitled to full faith and credit as a judgment, where the corporation or person owing the debt has been garnished in such sister State, and service has been made by publication upon the debtor, is not discussed in but one or two, and those cases are very different from this. I think, if Sharitt had brought his action in Missouri, instead of Kansas, and the railroad company had not been garnished, he could have recovered his wages in that State, and, if he could have recovered his wages by an action brought there, his claim or wages could be attached or garnished there.

RECENT PUBLICATIONS.

RIGHTS, REMEDIES AND PRACTICE at Law, in Equity and under the Codes. A Treatise on American Law in Civil Causes, with a Digest of Illustrative Cases. By John D. Lawson, Author of Works on Presumptive Evidence, Expert Evidence, Carriers, Usages and Customs, Defenses to Crimes, etc. In seven volumes. Vols. 4 and 5. San Francisco: Bancroft-Whitney Co. Law Publishers and Law Booksellers. 1890.

We took occasion in a late number of the JOURNAL, p. 290, to speak of the general plan of this work, its excellence and value, and we also gave a resume of the contents of volumes 1, 2 and 3. The volumes before us embraces the subjects within the third division of the general plan—Property Rights and Remedies. To particularize: Volume 4 treats of Negotiable Instruments, of Copyrights, Trade-marks and Patents, of Bailments, and therein the important topics of Common Carriers, Pledges, Innkeepers, and Telegraph Companies, and of Trusts. Volume 5 treats of Insurance, Fire, Life and Marine, Contracts and Remedies for its breach and Damages, and of Licenses.

From this statement will readily be seen the scope and comprehensiveness of the work. The practitioner, for example, will find within its pages as much on the subjects of Negotiable Instruments, and of Insurance and of Contracts as will be found in most existing special treatises on the same subjects. The chapters on Trade-marks and Copyright will be found especially valuable, in view of the dearth of authoritative works on the subject. The illustrations in the subnotes of the doctrine of the text are especially valuable and voluminous, and is a feature of Mr. Lawson's work which is very much to be commended. It enables the student with ease to grasp the underlying principle of the text and determine its scope and limitations. The voluminous citation of authorities proves the diligence and care of the author. Volumes 6 and 7, which are to complete the series, will make their appearance in the course of the summer. Practitioners who want at hand a ready reference to the authorities on questions of everyday interest will find it worth while to possess this series.

BOOKS RECEIVED.

THE AMERICAN AND ENGLISH ENCYCLOPÆDIA OF LAW. Compiled under the editorial supervision of John Houston Merrill, late editor of the American and English Railroad Cases and the American and English Corporation Cases. Volume XI. Northport, Long Island, N. Y.: Edward Thompson Co., Law Publishers. 1889.

COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS. By John F. Dillon, LL.D., member L'Institute de Droit International; late professor of Real Estate and Equity Jurisprudence in Columbia College Law School; formerly Circuit Judge of the United States for the Eighth Judicial Circuit, and Chief Justice of the Supreme Court of Iowa. Fourth edition, thoroughly revised and enlarged. Vols. 1 and 2. Boston: Little, Brown and Company. 1890.

A GENERAL REVIEW OF THE CRIMINAL LAW OF ENGLAND. By Sir Fitz James Stephen, K. C. S. I., D. C. L., Honorary Fellow of Trinity College, Cambridge; a corresponding member of the French Institute, a Judge of the Supreme Court, Queen's Bench Division. Second edition. London and New York: MacMillan & Co. The right of translation and reproduction is reserved.

THE SUGGESTIONS OF INSANITY in Criminal Cases, and the Trial of the Collateral Issue. By Wm. Wilkins Carr. Philadelphia: T. & J. W. Johnson & Co. 1890.

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

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1. ADMINISTRATOR—Removal.—An administrator cannot be removed simply because his administration has been continued for sixteen years. Such fact, alone, does not overcome the legal presumption of faithful performance of official duty.—*In re Moore's Estate*, Cal., 23 Pac. Rep. 794.

2. ADMINISTRATOR'S SALES. — A bill alleging that the property of plaintiff's decedent was sold on foreclosure in a suit brought by decedent's administrator, in his individual capacity, against himself as administrator, to foreclose mortgages held by him on the property, though he had at the time money in his hands as administrator sufficient to discharge the debt, and that defendants, subsequent purchasers, had knowledge of the facts, and praying for cancellation of the foreclosure sale and the subsequent sales, if filed within the period of limitation, is not demurrable for want of equity.—*Bryan v. Kales*, U. S. S. C., 10 S. C. Rep. 435.

3. ADMIRALTY—Jurisdiction.—Act Cong. March 3, 1887, ch. 373, § 1 (24 U. S. St. 552), does not apply to causes of admiralty and maritime jurisdiction: and a libel in admiralty, *in personam*, may be maintained against a corporation of another State in any district in which service may be had upon it. — *In re Louisville Underwriters*, U. S. S. C., 10 S. C. Rep. 587.

4. APPEAL—Injunction.—No appeal lies from an order refusing a temporary injunction, as such order is not a final decision, under Rev. St. U. S. § 1869, in regard to appeals from territorial district courts.—*Mahncke v. City of Tacoma*, Wash., 23 Pac. Rep. 804.

5. APPEAL—Writ of Replevin. — A judgment for the plaintiff, in an action to review a judgment, will, on appeal, be treated like an order granting a new trial, and will not be reversed, where there was some evidence showing a good defense to the original action.— *Hoppes v. Hoppes*, Ind., 24 N. W. Rep. 139.

6. APPEALABLE ORDERS— Highways. — Under the Indiana statutory proceedings for the construction of gravel roads, an appeal does not lie from an order of the commissioners for the construction of the road, but only from the final order confirming the report of the freeholders appointed to estimate the expense of the improvement. — *Anderson v. Claman County Treasurer*, Ind., 24 N. E. Rep. 175.

7. ATTACHMENT—Lien. — The intention of the legislature in adopting the several provisions of the statute was to give the creditor under an attachment, judgment, or execution the same standing in regard to his right or to the property effected thereby which he would gain by a purchase of the property from the debtor.—*Riddle v. Miller*, Oreg., 23 Pac. Rep. 807.

8 ATTACHMENT—Appeal-bond.—An appeal-bond conditioned that if defendant shall duly prosecute his appeal, and pay the judgment in case the same shall be affirmed, then the obligation shall be void, otherwise it shall remain full force, is not a written instrument for the direct payment of money, within the meaning of the attachment law. — *Hurd v. McClellan*, Colo., 23 Pac. Rep. 792.

9. BAILMENT—Negligence.—In an action for causing the death of a mare hired by plaintiff to defendant for use on a street railroad, it is proper to charge that defendant had a right to rely upon the mare being fit for such work, and was only required to treat her with reasonable care, but that if, after trying her, it became manifest that she was unfit for such work, and that further use would hurt her, defendant should stop using her without obtaining plaintiff's consent.—*Bass v. Cantor*, Ind., 24 N. E. Rep. 147.

10. BANKS AND BANKING.—Where a bank, drawer of a bill of exchange, represents to plaintiff, to whose order it is made payable, that one W is a *bona fide* holder of the bill, as purchaser or remitter, for his use in trading with K, and plaintiff, relying on such representation, takes the bill on deposit from K, knowing that he has received it from W, places it to his credit as cash, and pays his checks, the drawing bank or its receiver is estopped, in an action on the bill, to show that W was not a *bona fide* holder. — *Armstrong v. American Exchange Nat. Bank*, U. S. S. C., 10 S. C. Rep. 450.

11. CHATTEL MORTGAGE. — A debtor mortgaged his stock of goods to a creditor, and gave him possession thereof, with authority to sell at once, and apply the proceeds on the debt. The sheriff, with knowledge of the mortgage and of the mortgagee's possession, seized the goods on attachments of other creditors of the mortgagor, and sold and scattered them beyond recall: *Held*, that there being no question of *bona fides*, the mortgagee could recover of the sheriff the amount of the secured debt and interest, not exceeding the value of the goods at the time of their taking.—*Levy v. Sheehan*, Wash., 23 Pac. Rep. 802.

12. CONSTITUTIONAL LAW—Ways. — Act Ind. March 9, 1889 which provides for the condemnation of land for private ways, is unconstitutional. — *Logan v. Stogdale*, Ind., 24 N. E. Rep. 135.

13. CONSTITUTIONAL LAW— Federal Question.—Where, in a State court, it is contended that when the debt in question was contracted a decision of the State supreme court so construed a statute as to give it priority, and that the application of a different construction by earlier and later decisions, or of a subsequent amendment of the statute, would impair the obligation of the contract, a ruling by the court that the decision relied on is erroneous, and that the later and earlier decisions correctly construe the statute, and, with the amendment, merely state the law as it has always been, raises no federal question.—*Hopkins v. McLure*, U. S. S. C., 10 S. C. Rep. 407.

14. CONSTITUTIONAL LAW — Compensation. — Under Const. Mont. art. 7, § 4, declaring that certain State officers shall receive a certain sum as compensation; and art. 5, § 31, declaring that no law shall increase or diminish the salary of a public officer after his election; and art. 5, § 34, declaring that "no money shall be paid out of the treasury except upon appropriations made by law,"—the salaries of the officers enumerated are required to be paid, though the legislature has made no appropriation therefor, as the appropriation is made by the constitution itself.—*State v. Hickman*, Mont., 23 Pac. Rep. 740.

15. CONSTITUTIONAL LAW — Legislature. — Act Cong. Feb. 22, 1889, provides for the admission of certain territories into the union, and enacts that all laws in force made by the territories shall be in force in the States, "except as modified or changed by this act or by the constitutions of the States." Ordinance No. 2, promulgated by the constitutional convention of Montana, and adopted by the people, together with the constitution, provides

that the votes for members of the legislature shall be canvassed by the same board as the vote on the constitution, which board consists of the secretary of the territory with the governor and chief justice, or of any two of them: *Held*, that Comp. St. Mont. § 1033, which provides for a canvass by the county commissioners, was superseded. — *State v. Kenney*, Mont., 23 Pac. Rep. 733.

16. CONSTITUTIONAL LAW-Highways.—The public have, as regards a highway, merely the right of passage along and over it, the absolute property remaining in the owner of the soil from whom the right of passage was acquired; and the erection of poles, and the stringing of wires, by a telegraph company, along such highway, is an additional servitude, and constitutes a taking of private property for public use.—*Western Union Tel. Co. v. Williams*, Va., 11 S. E. Rep. 106.

17. CONSTITUTIONAL LAW — Taxation. — The laws of Pennsylvania, taxing bonds and other securities issued by corporations on their nominal instead of their actual value, are not an unjust discrimination, and do not violate Const. U. S. Amend. 14, forbidding States to withhold from any person the equal protection of its laws.—*Bell's Gap R. Co. v. Commonwealth of Pennsylvania*, U. S. S. C., 10 S. C. Rep. 533.

18. CONTRACT—Assignment.— Where the assignees of a contract to construct a railroad agree to save the assignor harmless from all liability by reason of subcontracts previously let by him, a failure to pay the amounts due on such subcontracts is a breach by the assignees, for which the assignor may recover without first showing payment by himself.— *Mills v. Allen*, U. S. S. C., 10 S. C. Rep. 413.

19. CONTRACT—Damages. — In an action for breach of contract, it is proper, where the evidence sustains such instruction, to charge that if defendant refused to permit plaintiff to perform the contract, and plaintiff was ready and willing to perform it, and would have made a profit thereon had it been performed, then they should take such profit into consideration in arriving at a verdict.—*Allphin v. Working*, Ill., 24 N. E. Rep. 54.

20. CORPORATIONS—Stock.—Whether a valid subscription to the capital stock of a corporation may be made by signing the preliminary articles.— *Coppage v. Hutton*, Ind., 24 N. E. Rep. 112.

21. CORPORATIONS— Stockholders. — In an action to charge a stockholder with a corporate debt, under Laws N. Y. 1848, ch. 40, § 10, which provides for the individual liability of a stockholder, judgments against the corporation, purchased by defendant while he was a director, and after he knew the corporation was insolvent, cannot avail him as a defense, beyond the amount which he shows he actually paid for them. — *Bulkley v. Whitcomb*, N. Y., 24 N. E. Rep. 13.

22. CORPORATIONS—Stockholders.— Rev. St. Mo. 1879, § 736, giving judgment creditors of a corporation having no corporate property to be levied on, the right, after notice, to issue execution against a stockholder for the unpaid balance due on his stock, does not impair the obligation of the contract of one who has previously subscribed for stock of a corporation, whose charter makes the amount due on subscriptions to such stock subject to the call of the directors, and exempts the stockholders from the levy of an execution on their private property for the debts of the corporation, and provides that such charter shall not be altered by subsequent legislation.—*Hill v Merchants' Mut. Ins. Co.*, U. S. S. C., 10 S. C. Rep. 559.

23. CORPORATIONS—Stock. — A purchaser of preferred stock in a corporation, issued without statutory authority, who was active in passing the resolution authorizing its issue, and who voluntarily subscribed and paid for it, cannot hold it for twenty-eight months, voting upon it, and using it to obtain control of the corporation's affairs, and then, upon the insolvency of the corporation, assert its invalidity, and recover the money he paid for it. — *Banigan v. Bard*, U. S. S. C., 10 S. C. Rep. 565.

24. COUNTIES—Contracts. — Where an architect appointed by the county commissioners to supervise the construction of a court-house orders a change in the work causing increased expense, and the contractor does the work called for by the change, and the commissioners accept the building as altered, the county is liable for extra work, though the cost of such change was not agreed to in the writing and attached to the original contract as therein provided.—*Gibson County v. Motherwell Iron & Steel Co.*, Ind., 24 N. E Rep. 115.

25. COUNTY BOARD—Powers. — In the absence of any statutory authority therefor, the county commissioners cannot provide that the county aditor shall receive compensation not provided for by the statute.—*Board of Commissioners v. Barnes* Ind., 24 N. E. Rep. 137.

26. COUNTY SURVEYOR—Compensation. — Rev. St. Ind. 1881, § 5952, authorized county surveyors to appoint deputies, but makes no provision for their compensation. Elliott's Supp. Ind. § 1206, provides that county surveyors "shall receive three dollars per day for actual services" in viewing ditches, and apportioning the repairs thereof among land-owners. *Held*, that the surveyor was not entitled to compensation for services of his deputies in regard to such ditches.—*State v. Roach*, Ind., 24 N. E. Rep. 106.

27. COVENANTS RUNNING WITH THE LAND. — Where a riparian owner contributes so much of his land, dam, ditch, etc., as may be necessary for the creation and enjoyment of a new water privilege, to be owned jointly by himself and two others, his covenant to keep the dam for the new privilege in repair, and to rebuild it, if necessary, at the sole expense of himself, his heirs and assigns, runs with the land, as it is connected with the subject of the grant and enters into its value.—*Nye v. Hoyle*, N. Y. 24 N. E. Rep. 1.

28. CRIMINAL LAW.—Assault. — Under Rev. St. Ill. ch. 38, § 23, which declares that "an assault with intent to commit murder, rape, mayhem, robbery, larceny, or other felony shall subject the offender to imprisonment in the penitentiary," an assault with intent to commit petit larceny is a penitentiary offense, though petit larceny is not a felony.—*Kelley v. People*, Ill., 24 N. E. Rep. 56.

29. CRIMINAL LAW.—Concealed Weapons. — A mail carrier who has a contract for two routes is, while going from one route to the other, a traveler, within the meaning of Rev. St. Ind. 1881, § 1985, which exempts travelers from its provisions making it a criminal offense to carry concealed weapons.—*Lott v. State*, Ind., 24 N. E. Rep. 156.

30. CRIMINAL LAW.— Alteration of Record. — Indictment which charged that the defendant did feloniously, willfully, and maliciously alter, deface, and falsify a record, to wit, the collector's book of a certain township, was sufficient.—*Loehr v. People*, Ill., 24 N. E. Rep. 68.

31. DEED—Estate Conveyed. — A deed expressed to be made to the grantor's children "and the heirs of their bodies" stated that the conveyance was made to said children, "their heirs and assigns," and contained the further statement: "Meaning and intending by this conveyance to convey to my said children the use and control of said real estate during their natural lives, and at their death to go to their children: *Held*, that, under Rev. St. Ill. c. 30, § 6, the grantees in said deed took a life-estate, with remainder in fee to their children; the word "heirs" in the deed not being used in its technical sense.—*Griswold v. Hicks*, Ill., 24 N. E. Rep. 63.

32. DIVORCE—Alimony. — A court of equity, as an incident to the power to decree divorces, may grant to the wife, *pendente lite*, on a proper showing, temporary maintenance and allowance for solicitor's fees, and enforce payment of the same against the husband, or his property, in the absence of a sufficient separate estate belonging to the wife.—*Lamy v. Catron*, N. Mex., 23 Pac. Rep. 773.

33. EASEMENTS—Discharge of Water.—Civil Code Cal. § 801, providing that the right of receiving water from or discharging it upon land, and the right of having water flow without diminution or disturbance of any kind, may be attached to other lands as easements,

without prescribing or regulating the mode of acquiring them.—*McDaniel v. Cummings*, Cal., 26 Pac. Rep. 795.

34. EASEMENT—LICENSE.—A license creates no interest in land. It is founded on personal confidence, and is not assignable, and its continuance depends on the will of the party giving it, and is revocable, unless the license is executed under such circumstances as would authorize the interference of equity to prevent fraud. To allow one to revoke a license when it was given to influence the conduct of another, and cause him to make large investments, would operate as a fraud, and warrant the interference of equity to prevent it, under the doctrine of equitable estoppel.—*Curtis v. La Grande Water Co.*, Org., 23 Pac. Rep. 808.

35. EJECTMENT—Defenses. — It may be shown in defense to ejectment that the deed under which the plaintiff claims was made to him in order to defraud the creditors of defendant by whom the consideration was paid, since in such case the law will not aid either party. —*Kirkpatrick v. Clark*, Ill., 24 N. E. Rep. 71.

36 ELECTIONS AND VOTERS—Presidential Electors. — Electors for president and vice president are State officers, who by Const. U. S. art. 2, § 1, are to be appointed by the State in such manner as its legislature may direct, and it is within the exclusive jurisdiction of the State to punish all fraudulent voting for such electors. *Fitzgerald v. Green*, U. S. S. C., 10 S. C. Rep. 586.

37. EMINENT DOMAIN—Compensation. — Under Const. Ill. art 2, § 13, a railroad which constructs its road beside a highway is liable to the owner of a farm on the opposite side of the highway for depreciation in the value of his farm caused by the construction and operation of the road so near the highway as to render it unsafe, and to make access to it from the farm with teams and stock more dangerous.—*Lake Erie & Western R. Co., v. Scott*, Ill., 24 N. E. Rep. 78.

38. EQUITY—Adequate Remedy at Law.—When defendant corporation, in a bill filed by creditors alleging its insolvency and praying the appointment of a receiver, suffers the bill to be taken *pro confesso*, it is too late, nine months after the receiver has taken possession of the property, and undertaken to carry on the business for the benefit of creditors, to object that plaintiffs had an adequate remedy at law.—*Brown, Bonnell & Co. v. Lake Superior Iron Co.*, U. S. S. C., 10 S. C. Rep. 608.

39. EQUITY—Burnt Records. — When the record of a patent for land in Illinois, and of a deed therefor by the patentee, has been destroyed, and the deed has never been re-recorded, a susbequent purchaser of the land may proceed in equity to have the record established under "Burnt Records Act."—*Gormley v. Clark*, U. S. S. C., 10 S. C. Rep. 554.

40. ESTRAY—Notice. — Rev. St. Ind. 1881, § 4838, section 4839 and section 4840, where personal notice is given advertising is not required, but the notice given must contain a statement of the trespass and the damages assessed in order to entitle the taker up to hold the animal.—*Haffner v. Barnard*, Ind., 24 N. E. Rep. 152.

41. EVIDENCE—Memoranda.—Where, in an action for the conversion of mortgaged property, the mortgagee, testifies that payments whose amounts he cannot remember have been made on the mortgage, a memorandum of such payments, made by his clerk, as to the manner of making which the mortgagee is ignorant, is not such a memorandum as he may be allowed to use to refresh his memory.—*Brotton v. Langert*, Wash., 23 Pac. Rep. 803.

42. EXECUTION SALE—Redemption. — A decree for alimony, to be paid quarterly, made it a lien on defendant's land, and provided that, on default of any payment, execution might issue, but made no provisions as to the manner of selling the land. The land was sold absolutely for the first installment, and then redeemed by an assignee of a subsequent installment, and resold absolutely to satisfy such subsequent installment: *Held*, that, the sale being voidable, as contrary to the statute, the defendant might redeem, even after the time for statutory redemption had expired, on paying the amount for which the land was sold, with interest. *Campbell v. Leonard*, Ill., 24 N. E. Rep. 65.

43. FEDERAL COURT—National Banks. — Under Act Cong. July 12, 1882, the circuit court of the United States has no jurisdiction of a suit by a stockholder of a national bank against the bank and its officers and directors, all of whom are residents of the same State, to compel collection of a note due the bank and payment to the bank by the directors of sums lost by reason of their illegal conduct.—*Whittemore v. Amoskeag Nat. Bank*, U. S. S. C., 10 S. C. Rep. 592.

44. FEDERAL COURTS—Jurisdiction.— Where the jurisdiction is founded only on the fact of diverse citizenship, suit for falsely and maliciously suing out an attachment may be brought in the circuit court of the district in which plaintiff resides, against a corporation residing in another State.—*McCormick Harvesting Machine Co., v. Walthers*, U. S. S. C., 10 S. C. Rep. 485.

45. FEDERAL OFFENSE—Perjury.— Under Rev. St. U. S. § 714, cl. 1, and section 5392, the federal court have exclusive jurisdiction of that offense, when committed in giving a deposition before a notary public to be used in the case of a contested election of a member of congress, as provided by Rev. St. U. S. § 110.—*Thomas v. Loney*, U. S. S. C. 10 S. C. Rep. 584.

46. FORECLOSURE—Res Adjudicata. — A bill praying for the appointment of a trustee in place of trustees named in deedz of trust given to secure debts due plaintiff, with authority to execute the trusts, in which a decree is rendered appointing a trustee, and declaring that it is made "without prejudice to all other rights of defendant," but which decree is void for uncertainty, is no bar to a subsequent suit to forclose the deeds of trust.—*Shepherd v. Pepper*, U. S. S. C., 10 S. C. Rep. 438.

47. FRAUDULENT CONVEYANCES. — A deed, absolute in form, intended to operate as a mortgage, if given, in good faith, to secure an actual indebtedness, is not constructively fraudulent as to the grantor's other creditors.—*McClure v. Smith*, Colo., 23 Pac. Rep. 786.

48. GAMING— Note. — Playing billiards or pool, where the defeated party is to pay for the use of the table or implements used in playing the game, or for any liquors or cigars to be used by the prevailing party, amounts to gaming, within the meaning of Pub. St. Mass. ch. 99, § 5.—*Murphy v. Rogers*, Mass., 24 N. E. Rep. 35.

49. HIGHWAYS— Appeal. — Under the Indiana statute which provides that no person shall take advantage of any error in the proceedings for the establishment of a free turnpike unless the party complaining is affected thereby, an appeal by some of those whose property would be affected by the proposed improvement does not suspend the proceedings as to those who did not appeal.—*Stipp v. Claman*, Ind., 24 N. E. Rep. 131.

50. HIGHWAYS—Obstruction.— The owner of buildings to which access is had by a public way has such an interest in the way as will enable him to maintain a private action for damages caused by its obstruction.— *Fassion v. Landrey*, Ind., 24 N. E. Rep. 96.

51. INJUNCTION — Corporation. — The plaintiff was a member of a "musical mutual protective union," one of whose by-laws provided that every member must refuse to perform in any orchestra in which any person is engaged who is not a member in good standing, except organists and musical directors of musical societies and members of traveling companies. Plaintiff was a director of a musical society, and manager of a traveling company. He and certain members of his company, members of said union, were notified by the directors of the union to appear and show cause why they should not be fined for a violation of said by-law: *Held*, that the injury threatened was conjectural only, and not a ground for an injunction against said directors.—*Thomas v. Musical Mut. Protective Union*, N. Y., 24 N. E. Rep. 24.

52. INSURANCE — Termination. — In a provision in a policy that the "insurance may be terminated, at the request of the insured, by repaying the company the

customary short rates from the date of this policy, together with the expenses of writing the risk," the "customary short rates" do not include "the expenses of writing the risk." — *State Ins Co. v. Horner*, Colo., 23 Pac. Rep. 788.

53. INSURANCE — Conditions. — In an application for insurance, where correct answers are given to a general agent of the company respecting incumbrances on the property of the applicant, and such agent fails to mention the incumbrances in the written application, but procures the signature of the applicant, accepts the premium, and closes the contract, the company will not be relieved from liability on account of misrepresentations in the application. — *German Ins. Co. v. Gray*, Kan., 23 Pac. Rep. 637.

54. INSURANCE—Conditions. — An insurance policy on several articles of personal property, for separate sums, aggregating $1,000, provided that it should be void in case the insured was not the sole, absolute, and unconditional owner of the property. One of the articles, insured for $350, had been bought on credit, and the insured had stipulated that the title should not pass until the price was fully paid: *Held*, that the entire policy was void, the contract being entire. — *Geiss v. Franklin Ins. Co.*, Ind., 24 N. E. Rep. 99.

55. INSURANCE—Agents.—Plaintiff asked an insurance broker to obtain insurance for him. The broker applied to a firm of insurance agents, who procured the insurance from defendant. They had no authority to place insurance for defendant, but were in the habit of submitting applications to it for action. They received from defendant part of the premium for their compensation in the matter: *Held*, that they were defendant's agents, so as to charge it with their knowledge regarding the insured premises. — *Indiana Ins Co. v. Hartwell*, Ind., 24 N. E. Rep. 100.

56. JUDGMENT— Husband and Wife. — Where a man buys land under an agreement that it shall belong to his wife, and pays for it with money borrowed from one who expects to be, and afterwards is repaid by the proceeds of a sale of the wife's separate property, the equitable title of the wife is superior to the lien of the husband's judgment creditors.—*Warren v. Hull*, Ind., 24 N. E. Rep. 96.

57. JUDGMENT — Interest. — Comp. St. Mont div. 5, § 1237, authorizing interest on judgments "from the day of entering up such judgment," allows interest on a judgment entered *nunc pro tunc*, from the day in which the judgment is to be considered as entered.—*Barber v. Briscoe*, Mont., 23 Pac. Rep. 726.

58. JUDGMENTS— Inferior Courts. — Where defendant pleads a judgment in garnishment rendered against plaintiff by a justice in another State, and alleges that due process and notice were served on plaintiff, a reply setting up plaintiff's residence in this State, and averring that he did not consent that such court should have jurisdiction of his person, and that it had no jurisdiction to render the judgment pleaded is insufficient. —*Terre Haute & I. R. Co. v. Baker*, Ind., 24 N. E. Rep. 83.

59. LANDLORD AND TENANT. — A tenant who, when sued by his landlord for possession, sets up a claim of title adverse to the landlord, is precluded from defending on the ground that his lease has not terminated, since his denial of the landlord's title puts an end to his lease.—*Tobin v. Young*, Ind., 24 N. E. Rep. 121.

60. LANDLORD AND TENANT. — The acceptance of rent under a lease void under the statute of frauds creates only a tenancy from month to month, the rent being payable monthly. — *Utah Loan & Trust Co. v. Garbutt*, Utah, 23 Pac. Rep. 758.

61. LANDLORD'S LIEN.—Under Comp. Laws N. M § 1537, where there are several rooms in one building, each occupied by a separate tenant, as between the landlord and the several tenants each appartment so occupied is a "house," within the meaning of the statute, and, when the landlord consents to a removal of a tenant's property from a separate room so occupied to another room in the building, his lien for the rent of the first room is lost.— *Wolcott v. Ashenfelter*, N. Mex., 23 Pac. Rep. 780.

62. LIFE INSURANCE—Conditions.—To work a forfeiture of a life insurance policy under a condition avoiding it if the assured "shall become so far intemperate as to impair his health seriously and permanently or induce *delirium tremens*," it is not sufficient that the assured indulged in the use of intoxicating liquors to the extent of impairing his health seriously, unless the impairment was permanent.— *Ætna Ins. Co. v. Deming*, Ind., 24 N. E. Rep. 88.

63. LIMITATION OF ACTIONS— New Promise. — On the back of a note for $789, which was barred by the statute of limitations, the holders wrote, "We agree to accept $500 in full satisfaction of within note during 1885," and the maker wrote, "I accept the above condition," and signed his name thereto: *Held*, that these indorsements constituted an absolute contract by the maker to pay $500 during the year 1885. — *Whittaker v. Crow*, Ill., 24 N. E. Rep. 57.

64. MARRIAGE — Breach of Promise. — A complaint stated that in consideration that the plaintiff, being unmarried, promised to marry the defendant, he promised to marry plaintiff at a certain date; that plaintiff was ready to marry him; and that defendant failed and refused to marry her at the time set, and had hitherto refused so to do: *Held*, that the complaint sufficiently alleged a mutual promise to marry, and the breach of such promise by the defendant. — *Adams v. Byerly*, Ind., 24 N. E. Rep. 130.

65. MASTER AND SERVANT— Risks of Employment.—It is negligence to use, at a station where there are several tracks, and where couplings are required to be made promptly, open instead of blocked frogs, whereby the feet of employees making couplings are liable to be caught. Risks of employment do not include risks arising from neglect to use safety blocks in frogs, on the employer's railroad track; that being a reasonable means to prevent injury to employees making couplings.—*Seley v. Southern Pac. Ry. Co.*, Utah, 23 Pac. Rep. 751.

66. MECHANICS' LIENS. — Under Comp. Laws Utah, § 3806, the subcontractor's lien attaches from the time he begins to labor or furnish materials, provided he gives notice within thirty days, but the amount of all liens cannot exceed the amount of the contract with the owner, and a complaint to foreclose a subcontractor's lien should allege the amount due the contractor, less any payment made for labor or materials furnished before plaintiff's lien attached.— *Teahen v. Nelson*, Utah, 23 Pac. Rep. 764.

67. MECHANICS' LIENS—Priority. — A mechanic's lien for the construction of a dock on the property of a railroad company is subordinate to the lien of a mortgage on the company's property, recorded three years before the improvements were made. — *Toledo, etc. R. Co. v. Hamilton*, U. S. S. C., 10 S. C. Rep 546.

68. MINES AND MINING—Aliens. — Only citizens, and those who have declared their intention to become such, having a right to locate and purchase mining lands from the United States, the naturalization of an alien during trial will not retroact so as to validate his claim.—*Wueff v. Manuel*, Mont., 23 Pac. Rep. 723.

69. MORTGAGE—Foreclosure. — The assignment by a mortgagee of his certificate of purchase of the mortgaged premises, at a foreclosure sale thereof, passes all title to the debts secured, or intended to be secured, by the mortgage; and the mortgagee cannot thereafter maintain an action for the reformation of the mortgage. —*Whipperman v. Dunn*, Ind., 24 N. W. Rep. 166.

70. MORTGAGE FORECLOSURE. — Act Ind. 1879, p. 160, § 10, provides that no married woman shall mortgage her separate property for the debt of her husband. A complaint alleges that a mortgage was given for money loaned to the female mortgagor for the purpose of discharging a lien on the property, and used for that purpose: *Held*, that an answer which does not deny that allegation, but alleges that the debt secured by

the mortgagee was the separate debt of her husband, is sufficient.—*Stanford v. Broadway Sav. & Loan Co.*, Ind., 24 N. E. Rep. 154.

71. MUNICIPAL BONDS—Laches. — For more than nine years a town regularly paid the interest on railroad aid bonds issued by it, and also paid a part of the principal. The balance of the bonds, which were apparently valid, meanwhile passed into the hands of *bona fide* purchasers for value: *Held*, that the town had been guilty of such unreasonable laches that equity would not decree a cancellation of the bonds, though actually void, and though the delay in bringing suit had not continued for the full statutory period of limitation of equitable actions.—*Calhoun v. Delhi, etc. R. Co.*, N. Y., 24 N. E. Rep. 27.

72. MUNICIPAL BONDS—Subscription. — Act Mo. March 3, 1851, § 14, empowering county courts to "subscribe to the stock" of a railroad company; to "invest funds" of the county in such stock; to "issue the bonds of such county to raise funds to pay the stock" subscribed; and providing that "any incorporated city or town may subscribe to the stock" of such company,—does not authorize an incorporated town to issue its negotiable bonds in payment of the stock.— *Hill v. City of Memphis*, U. S. S. C., 10 S. C. Rep. 562.

73. MUNICIPAL CORPORATIONS— Streets. — Under Rev. St. Ind. 1881, § 3037, providing that when the city authorities have once established the grade of a street such grade shall not be changed until the damages occasioned by such change shall have been assessed and tendered to the persons injured thereby, a complaint for damages occasioned by raising a street "above the established grade" is defective in not showing that the grade had been legally established.—*City of Valparaiso v. Adams*, Ind., 24 N. E. Rep. 107.

74. MUNICIPAL CORPORATIONS—Judicial Notice.—Laws Utah 1888, ch. 48, divides cities into classes, and provides the way, but not an exclusive one, by which cities should determine to which class they belong: *Held*, that the court will take judicial notice of the class to which a city belongs, and the city becomes a member of its proper class without anything done on its part.—*People v. Page*, Utah, 23 Pac. Rep. 761.

75. MUTUAL BENEFIT SOCIETY. — The certificate of membership in a mutual insurance association issued to deceased not indicating that he was received as a member of a "senior department" created for persons over seventy-five years old, and no special mortuary fund being named, a finding that he was not received as a member of such special department will not be disturbed, though defendant association had issued by-laws creating such senior department, and its members were divided into divisions, one of which included those over seventy-five; such divisions being made, not for the purpose of grading benefits, but for regulating assessments. — *Old Wayne Mut. Life Ass'n v. Nordby*, Ind., 24 N. E. Rep. 159.

76. NATIONAL BANKS— Stock. — Where a person subscribes to a certain proposed increase of stock of a national bank, and pays his subscription, he is bound thereby, though the bank, under the provisions of its by-laws to "determine what disposition shall be made of the privilege of subscribing for the new stock" when it has not all been subscribed for within the time given in its notice, limits the amount of the increase to the amount paid in.—*Aspinwall v. Butler*, U. S. S. C., 10 S. C. Rep. 417.

77. NEGOTIABLE INSTRUMENTS. — Under Rev. St. Ind. 1881, § 5501, which provides that all notes or other instruments in writing, signed by any person who promises to pay money, shall be negotiable by indorsement, an instrument in the following form: $147.70. Nov. 28, 1883. Four months after date I promise to pay to the order of the Michigan Mutual Life Ins. Co.——dollars, value received. J. B. W.,"—is a negotiable note for the sum of $147.70.—*Witley v. Michigan Mut. Life Ins. Co.*, Ind., 24 N. E. Rep. 141.

78. PARTNERSHIP — Assignment. — Act Tex. March 24, 1879, providing that any debtor "may make an assignment for the benefit of such of his creditors only as will consent to accept their proportional share of his estate, and discharge him from their respective claims, and in such case the benefits of the assignment shall be limited and restricted to the creditors consenting thereto," gives a limited partnership the right to make such assignment, and modifies, so far as such assignment is prohibited thereby, Rev. St. Tex. art. 3460, declaring that every assignment by a limited partnership, when insolvent, or in contemplation of an insolvency, with intent of giving a preference to any creditor, shall be void, as against the other creditors.—*Tracy v. Tuffly*, U. S. S. C., 10 S. C. Rep. 527.

79. PARTIES— Non-residents. — In a suit for the proceeds of a note alleged to have been disposed of by defendant in violation of a contract, by which he had agreed to hold it "subject to the joint order and direction" of the respective attorneys of the adverse claimants of the note, made subsequent to proceedings before an arbitrator respecting the ownership of the note, one of the claimants being the complainant, the other claimant and the respective attorneys are necessary parties.—*Gregory v. Stetson*, U. S. S. C., 10 S. C. Rep. 422.

80. PATENTS FOR INVENTIONS— Duration.—Under Rev. St. U. S. § 4887, providing that "every patent granted for an invention, which has been patented in a foreign country, shall be so limited as to expire at the same time with the foreign patent, or, if there be more than one, at the same time with the one having the shortest term," the United States patent expires at the same time with the term limited to the foreign patent, without regard to the lapse of forfeiture of a portion of such term by the operation of conditions subsequent.— *Pohl v. Anchor Brewing Co.*, U. S. S. C., 10 S. C. Rep. 577.

81. PRINCIPAL AND SURETY — Contribution. — In an action for contribution against a cosurety on a note paid by plaintiff, it is a good defense that defendant indorsed the note after plaintiff, and that he did so with the understanding between himself and the makers and payee that he should be liable thereon only after those who had indorsed before him should be exhausted.—*Houck v. Graham*, Ind., 24 N. E. Rep. 113.

82. PUBLIC LANDS— Evidence. — Under Rev. St. U. S. § 891, transcript of the records of the general land office properly certified, concerning the location of a land-warrant, and containing the various acts of the register and receiver of the local land office, showing the location of the land, and that it was subject to location, and other proceedings in relation thereto, is competent evidence in an action involving the title to such land.—*Culver v. Uthe*, U. S. S. C., 10 S. C. Rep. 415.

83. QUIETING TITLE—Publication.— A State has power to provide by statute that the title to land within its limits shall be settled and determined by a suit in which the defendant, being a non resident, is brought into court by publication only.—*Arndt v. Griggs*, U. S. S. C., 10 S. C. Rep. 553

84. RAILROAD BONDS—Alteration.—Certain negotiable bonds, part of a large issue made by a railroad corporation, and numbered consecutively, owned by the plaintiff, were stolen, the numbers altered, and afterwards bought in good faith before maturity and for value by a purchaser. In a suit against the corporation to recover the amount of the bonds by the original owner, *held*: (1) That the original owner could not recover if the bonds were outstanding in the hands of a purchaser who acquired good title to them. (2) That the obligation represented by the bonds was not annulled by the alteration of the serial numbers made by a wrong-doer without the privity of the purchaser, as the numbers were a matter extrinsic to the contract, and not a material part thereof.—*Wylie v. Missouri Pac. Ry. Co.*, U. S. C. C., (N. Y.), 41 Fed. Rep. 623.

85. RAILROAD BONDS.—Where a person purchases of a railroad company part of a series of bonds secured by a mortgage on its road, under an agreement with the company that no more of the bonds shall be issued, he is entitled to have such bonds paid out of the proceeds

of a sale under the mortgage, in preference to bonds subsequently issued to purchasers with notice of the agreement, but not in preference to *bona fide* purchases, where the agreement, though recorded is not required to be by law, nor made to constitute notice, and no intimation of it is contained in the mortgage.—*McMurray v. Moran*, U. S. S. C. 10 S. C. Rep. 427.

86. RAILRNAD COMPANY—Crossings.—It is the duty of a traveler to look and listen before attempting to cross a railroad track, and especially at a crossing known to him to be dangerous from its obstructed view, and the conformation of its surroundings rendering it difficult to hear.—*McBride v. Northern Pac. Ry. Co.*, Oreg., 23 Pac. Rep. 814.

87. RAILROAD COMPANY—Lease.—When a railroad corporation, in debt, has leased its road and properties for 999 years to another corporation, which has agreed to pay all judgment liens against the lessor, and to complete its road, and the two companies have executed a deed of trust to secure bonds of the lessor, the proceeds of which are received by the lessee and partly used for its own benefit, the lessee will in equity be held liable for debts which, previous to the lease, existed against the lessor, though they were not reduced to judgment. —*Chicago, M. & St. P. Ry. Co., v. Third Nat. Bank*, U. S. S. C. 10 S. C. Rep 550.

88. RECEIVERS—Trust Property.—A receiver appointed to take charge of mortgaged premises after judgment of forclosure pending the sale, who purchases the property during his receivership, is not entitled to retain the rents and profits as his own, since his purchase is void as to the parties to the suit.—*Herrick v. Miller*, Ind., 24 N. E. Rep. 111.

89. REFORMATION OF DEED.—A complaint in a suit to reform a written instrument in consequence of a mistake in its execution must allege facts. It must show what the parties to the instrument mutually agreed to do, and wherein the writing fails to express their agreement and that the mistake did not occur through any carelessness or negligence of the plaintiff; otherwise a demurrer to the complaint should be sustained. —*Hyland v. Hyland*, Oreg., 23 Pac. Rep. 811.

90. REPLEVIN— Infancy. — A female infant who has married a man of full age, and whose guardian has settled with her, being entitled to the possession of her estate, may sue one to whom her husband has fraudulently transferred a portion thereof for its recovery by next friend, as authorized by Rev. St. Ind. 1881, §§ 255, 256.—*Bush v. Groomes*, Ind., 24 N. E. Rep. 81.

91. SALE—Warranty. — Where a contract fixed the price for the sale of a certain quantity of hops to be delivered in a good and merchantable condition, etc., but contained a further provision giving the benefit of the rise in the market to the seller, with the privilege of closing the sale within a time specified: *Held*, that the provision was intended for the benefit of the seller, and, if he failed to exercise the privilege and close the sale within the time limited, it became *functus officio*, and the price fixed by the contract became the price agreed to be paid.—*Bump v. Cooper*, Oreg., 23 Pac. Rep. 806.

92. SALE—Warranty.—A written contract of sale of varnish, etc., provided: "These goods to be exactly the same quality as we make for" certain third persons, "and as per sample bbls. delivered;" and continued: "Turpentine copal varnish at 65 cts. per gallon; Turpentine japan dryer at 55 cents per gallon:" *Held*, that the latter terms were but stipulations as to price, and imported no warranty that the goods delivered should be articles known to the trade by those names, and of a certain standard of quality.—*De Witt v. Berry*, U. S. S. C., 10 S. C. Rep. 536.

93. SALE OF LAND—Parol Contract.— A parol sale of land without delivery of possession is void, though part of the price was paid: and it is immaterial that the contract was a renewal of one under which possession had been delivered to the purchaser, and the former contract having been mutually abandoned—*Maxfield v. West*, Utah, 23 Pac. Rep. 754.

94. SCHOOL FUND—Mortgage.—A married woman who has mortgaged her land to secure a loan from the school fund, cannot, in an action against the county auditor, obtain a cancellation of the mortgages on the ground that the loan was made for her husband, since the auditor, though authorized by statute to release such mortgages in certain cases, is not a party in interest.—*Snodgrass v. Morris*, Ind., 24 N. E. Rep. 151.

95. SPECIFIC PERFORMANCE—Contract to Support.—An executory agreement to convey real estate, in consideration of the support and maintenance of the owner, will be specifically enforced in favor of the party who takes possession and fully performed his part in reliance on the contract.—*Denlar v. Hill*, Ind., 24 N. E. Rep. 170.

96. TAXATION—Voluntary Payment.—A tax-payer who goes to the tax-office and pays an illegal tax under protest, when the the tax has not been demanded of him and no effect to collect it from his property has been made, cannot recover back the money; the payment being voluntary.—*Conkling v. City of Springfield*, Ill., 24. N. E. Rep. 67.

97. TAXATION—Injunction.—In an action to enjoin the execution of a tax-deed on the ground of irregularities in the sale which render it ineffectual to pass title, a complaint which alleges a tender of the amount due, but fails to allege that the tender is brought into court for the benefit of the purchaser is bad.—*City of Logansport v. Case*, Ind., 24 N. E. Rep. 88.

98. TRUSTS—Evidence.—A bank deposit book which designates the depositor as trustee for another is not conclusive of the existence of a trust.—*Parkman v. Suffolk Sav. Bank*, Mass. 24 N. E. Rep. 43.

99. VENDOR & VENDOR—Assumption of Debt.—Certain lots were conveyed to defendant "subject, however, to certain incumbrances now resting thereon, payment of which is assumed by said party of the second part:" *Held*, that, though he had no knowledge of the conveyance at the time of its execution, he could not, after accepting the rents therefrom, and selling and conveying the lots subsequent to his knowledge of the contents of the conveyance to himself, repudiate his liability to his grantor for a branch of the agreement.—*Keller v. Ashford*, U. S. S. C., 10 S. C. Rep. 494.

100. WATERS AND WATER-COURSES—Accretion. — The rule that owners of land bounded by streams are entitled to additions to their land formed by accretion is applicable to the Missouri river, notwithstanding the peculiar character of that stream, and of the soil through which it flows, whereby changes in its banks are great and rapid.—*Jefferis v. East Omaha Land Co.*, U. S. S. C. 10 S. C. Rep. 518.

101. WILL—Capecity.—Evidence that the testator was addicted to excessive use of liquor; that he was insanely jealous of his wife, whom he accused of unchastity, though she was 60 years of age, and of excellent character; and that he finally killed his wife, and then committed suicide on account of her supposed unfaithfulness,—is sufficient to show that he was of unsound mind.—*Burkhart v. Gladish*, Ind., 24 N. E. Rep. 118.

102. WITNESS—Privilege. — Where, in a civil action for assault and battery, plaintiff calls the defendant as a witness, and asks him whether he committed the battery complained of, and defendant refuses to answer, on the ground that his answer might tend to criminate him, such refusal is a proper matter to be considered by the jury in connection with plaintiff's own testimony that defendant committed the battery. —*Morgan v. Kendall*, Ind., 24 N. E. Rep. 143.

103. WITNESS—Party.— The introduction by a plaintiff of the examination of the defendant as a witness, taken before the trial, under Rev. St. Ind. 1881, § 510, does not make the latter plaintiff's own witness, so as to preclude plaintiff from specifically negativing any statement contained in it.—*Crocker v. Agenbroad*, Ind., 24 N. E. Rep. 169.

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